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Supreme Court of the United States

October Term 1975
No. 75-1325

SUNKIST GROWERS, INC.,

Petitioner,

vs.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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SUNKIST GROWERS, INC.,

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vs.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner, Sunkist Growers, Inc. ("Sunkist"), respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 11, 1975, as corrected on December 17, 1975.

Opinions Below.

The Opinion of the Court of Appeals for the Ninth Circuit of November 11, 1975, as corrected on December 17, 1975, and the Opinion of the United States District Court for the Northern District of California of May 11, 1973 appear in the Appendix hereto. The Ninth Circuit Opinion is reported at 526 F.2d 1196 (9th Cir. 1975).

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Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 11, 1975. A timely petition for rehearing was denied on December 17, 1975, and a corrected opinion was issued on that date. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can a private party antitrust plaintiff maintain an action under Section 4 of the Clayton Act by proving anticompetitive purpose but not effect?

2. May a private party antitrust plaintiff calculate damages based on lost sales projections which assume no competing sales by a defendant when that defendant's competition is not part of the claimed antitrust violations?

3. Is a market share of approximately 50% sufficient to establish monopoly power absent other proof of power to control prices or exclude competition?

4. Does an association which itself does not engage in business have standing under Section 16 in the Clayton Act to seek injunctive relief for the benefit of its members?

STATUTORY PROVISIONS AND RULES INVOLVED.

15 U.S.C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign national, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any

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contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Federal Rules of Civil Procedure.

Rule 17.

PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law

under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

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Statement of the Case.

Petitioner Sunkist Growers, Inc. ("Sunkist") is an agricultural marketing cooperative whose members grow approximately 75% of all oranges grown in California and Arizona.[1] It is a defendant in these two actions,[2] one brought by respondent the Pacific Coast Agricultural Export Association ("Association") as assignee for seven of its members who export fresh fruit, vegetables and other commodities to Hong Kong and other markets abroad. The other action was brought by M-C International, Inc. ("M-C"), an exporter who is not a member of the Association. (For convenience, "Respondents" is sometimes used hereinafter to the Association's assignors and M-C.) The suits were commenced pursuant to §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) and 28 U.S.C. § 1337 to recover damages and obtain injunctive relief for alleged violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

Prior to 1966, substantially all of Sunkist's fresh orange sales to the Crown Colony of Hong Kong, one of its major export markets, were made by the Association's members, M-C and other fresh fruit exporters. In March of that year Sunkist changed its method of distribution to respond to heavy competitive

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[1]In *Case Swayne v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), the Court found Sunkist was not properly constituted to take advantage of the antitrust exemption contained in the Capper-Volstead Act. (7 U.S.C. §§ 291, 292.) Thereafter, Sunkist reconstituted itself to comply with Capper-Volstead. *Case Swayne v. Sunkist Growers, Inc.*, 355 F.Supp. 408, 410-412 (C.D. Cal. 1971). Without objection by respondents, the district court below instructed the jury Sunkist was a lawfully constituted Capper-Volstead cooperative.

[2]Reliance Commercial Enterprises, Inc. ("Reliance") was a second defendant named by M-C only.

pressure in the Hong Kong market from other orange producing countries, particularly Australia and South Africa. These foreign competitors generally underpriced Sunkist and other American orange suppliers and offered attractive agency arrangements which significantly reduced the market risks to the Hong Kong fresh fruit importers. As a result, foreign orange sales increased dramatically.

The American exporters did not deal effectively with this competition. The members of the Association, which is organized under the Webb-Pomerene Act,[3] agreed on uniform commissions for Sunkist and other American oranges exported to Hong Kong. Those commissions were closely followed by non-members, leaving no effective price competition among the American exporters. In fact, notwithstanding foreign price pressure, the uniform commissions continued to increase steadily. In December 1965, when foreign competition was particularly strong, the Association jumped the commission from $.36 to $.61 per carton. (SK 4198B.)[4]

The Hong Kong importers who purchased Sunkist oranges, which historically accounted for approximately 70% of all American oranges sold in Hong Kong, complained directly to Sunkist asking for a change in its method of distribution. Sunkist responded in March 1966 by retaining Reliance as its exclusive agent in Hong Kong to perform substantially the same services of transmitting orders and related functions which the exporters had previously performed. In addition, Reliance provided valuable sales promotion on the scene in Hong Kong. Reliance agreed to take

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[3]15 U.S.C. §§ 61-65.

[4]Hereinafter petitioner's exhibits admitted in evidence will be designated "SK" and citations to the reporter's transcript will be designated "R.T."

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as its agent's commission $.07 per carton instead of the $.61 per carton commission (over and above freight and insurance) that the exporters were then incorporating in the price they charged Hong Kong importers. In other words the importers would save $.51 per carton on Sunkist oranges, thereby reducing the price of a carton by a full 10%, from approximately $5.50 to $5.00. (SK 2601, 2709.)

Thereafter, while Sunkist was selling to Hong Kong importers exclusively through its agent, Reliance, the exporters continued to sell substantial volumes of Sunkist and other American oranges to Hong Kong importers. The exporters bought their Sunkist oranges on the domestic American market. By buying on the domestic market, the exporters were able to sell to the Hong Kong importers oranges from specific Sunkist packinghouses which were considered of premium quality in Hong Kong. Sunkist, on the other hand, would sell oranges in Hong Kong only from an export "pool" of oranges drawn from all its 105 packinghouses spread over California and Arizona.[5] Prior to 1966, the exporters had sold such pool fruit almost exclusively, but at trial they admitted they did not want this pool

[5]As a cooperative, Sunkist has an obligation to allocate equitably all sales opportunities. On the domestic market, Sunkist need not take any affirmative action to assure such an allocation because a federal marketing order effectively allocates on a pro rata basis all domestic sales opportunities among packinghouses. 7 U.S.C. § 601 *et seq.* 7 C.F.R. §§ 907, 908 (1975). No federal marketing order allocates foreign sales, so Sunkist has adopted the export pool as a substitute for the federal marketing order.

fruit any longer, because they could not sell pool fruit in competition with Sunkist's lower prices, made possible principally by Reliance's $.07 commission. However, they did seek as much premium quality fruit as they could get on the domestic market. With this fruit, the exporters could obtain premium prices and cover their higher commissions.

As a result, a healthy competition between Sunkist and the exporters developed, and overall American oranges competed more effectively with foreign oranges sold in Hong Kong. From a total of 1,234,661 cartons of American oranges exported to Hong Kong in 1965, the last year the exporters handled all the business, the trade grew to 3,089,386 cartons in 1970 and 2,689,-980 in 1971. (SK 2592G.) In 1966, the first year of Sunkist's relationship with Reliance, Sunkist sold through Reliance 70% of all American oranges sold to Hong Kong, but the share fluctuated between 45% and 62% thereafter. (SK 4141.)

In 1968 the respondents brought suit under §§ 1 and 2 of the Sherman Act. The essence of respondents' §§ 1 and 2 claims was Sunkist's refusal to sell them pool oranges because of its exclusive agency agreement with Reliance. Respondents further alleged Sunkist interfered with their access to Sunkist oranges on the domestic market, attempted in 1966 to deny them adequate shipping space for their oranges, and improperly gained access to their two dozen or so customers through the use of a customer list Sunkist had obtained

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in 1965 as part of an insurance program Sunkist had sponsored.[6]

Over Sunkist's objection, the trial was bifurcated between liability and damages. On liability, the jury found Sunkist (and in M-C's case, Reliance) had violated §§ 1 and 2 of the Sherman Act and specifically found Sunkist had monopolized a market defined as "oranges grown in California and Arizona for export to Hong Kong." During the liability trial, the Association's assignors and M-C admitted they had no interest in selling pool oranges in competition with Sunkist,[7] but claimed injury on the sole basis that they had not been able to buy all the premium quality oranges from the domestic market that they would like to have sold in Hong Kong. The plaintiffs produced no evidence of any specific lost sales because of inability to obtain domestic oranges or because of any interference on Sunkist's part.[8]

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[6]Respondents claimed Sunkist "acquired" their customers, but the use of such a word is inaccurate. Throughout the period from 1966 on, respondents sold substantial quantities of oranges to Hong Kong importers who also bought fruit from Sunkist. There is no allegation Sunkist required the importers to stop dealing with respondents.

[7]Typical of their testimony was that of Joseph Kukulan of assignor Paramount Export Company:

> "Q. If you were to begin buying oranges tomorrow directly from the Sunkist export department, do you believe you could compete with Sunkist in the sale of those export non-brand oranges in Hong-Kong?
> "A. No, I don't.
> "Q. You think you could not compete?
> "A. Yes, we could not compete." [R.T. 937.]

See also, R.T. 365, 938, 1010, 1126.

[8]The closest respondents came was testimony that in August 1972, shortly before trial, Sunkist had failed to fill one order of oranges for one of the Association's assignors and had failed to supply a reason for the lack of shipment. [R.T. 7056-7057.]

At the damage trial, respondents adopted a simplistic theory of lost sales. They computed their lost sales by comparing their actual sales after 1966 with the volume of oranges they would have sold had they maintained the same percentage share of the market they had had prior to 1966. In other words, respondents assumed Sunkist was not competing with them in the post-1966 market and simply divided up Sunkist's share according to their own pre-1966 market shares.

No other evidence on damages was introduced. There was no evidence of lost sales of premium quality oranges because of unavailability of supply; no evidence of lost sales because of any interference by Sunkist; and no evidence of lost sales because of Sunkist's refusal to sell pool oranges to respondents, except for the projections assuming Sunkist was not selling pool oranges through Reliance. The jury awarded the Association $238,704 and M-C $2,363 in damages.

After trial, respondents sought injunctive relief dissolving Sunkist or barring Sunkist from the Hong Kong market. Sunkist objected to any injunctive relief in the Association case on the ground the Association was not itself in the business of exporting oranges to Hong Kong and had no standing to seek such relief for the benefit of its members.

The district court specifically found that the gravamen of respondents' complaint was Sunkist's refusal to deal (Appendix p. 37) and explicitly tailored its relief to that end by prohibiting the exclusive arrange-

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ment with Reliance, requiring Sunkist to offer to sell plaintiffs pool oranges and compelling Sunkist to sell oranges on the domestic market to any qualified purchaser. The district court expressly permitted Sunkist to continue to sell to importers in the Hong Kong market and specifically rejected respondents' request to dissolve Sunkist or bar it from selling in the Hong Kong market on the ground that any such relief was inappropriate in light of the facts of the case.

Respondents appealed the district court's refusal to order Sunkist's dissolution or bar it from selling in the Hong Kong market, and Sunkist and Reliance cross-appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment in all respects on November 11, 1975. Sunkist petitioned for a rehearing, which was denied on December 17, 1975, although the Ninth Circuit issued a corrected opinion on that date revising certain portions of its opinion relating to the issues of injury and damages.

REASONS FOR GRANTING THE WRIT.

The opinion below departs significantly from prior antitrust precedents relating to elements of injury and damages and monopolization and raises a conflict in the circuits on the standing of an association to seek equitable relief for its members under § 16 of the Clayton Act.

1. The Court Below Has so Liberalized the Requirement That a Private Party Antitrust Plaintiff Prove Injury and Damages Resulting From Claimed Violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) That It Has Emasculated the Standing Requirement of § 4 of the Clayton Act (15 U.S.C. § 16), Much as the Third Circuit Did in a Case Arising Under § 7 of the Clayton Act (15 U.S.C. § 18), Brunswick Corp. v. Pueblo Bowl-O-Mat (No. 75-904), Cert. Granted on February 23, 1976.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat* (No. 75-904), the Third Circuit was so concerned about the vigorous enforcement of § 7 of the Clayton Act (15 U.S.C. § 18) that it permitted a plaintiff to seek damages even where there was no proof of injury arising from any lessening of competition or monopoly. The Court has granted certiorari on that issue. 44 U.S.L.W. 3461-62.

The Ninth Circuit has followed the same lure of vigorous antitrust enforcement in this action arising from alleged violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) by emasculating the requirement that a plaintiff prove injury and damage resulting from the alleged antitrust violation. In fact, the Ninth Circuit goes far beyond the Third Circuit by

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holding that the damage proof may be based on projections of lost sales which assume no competing sales by a defendant when that defendant's competition is not part of the claimed antitrust violation.

The court's error centers around its ruling that the termination of a distributor pursuant to an exclusive dealing arrangement "may be unlawful if either the purpose *or* effect is to restrain trade unreasonably." (Emphasis supplied.) Appendix at p. 9.[9]

The court's error in using the disjunctive "or" becomes manifest when it applies the principle to the facts;[10] the effect is to permit respondents' verdict to stand even though no injury or damage was proved to flow from the claimed violations. In finding sufficient evidence to sustain a jury verdict on unlawful purpose, the court refers to respondents' claims that Sunkist interfered with its competitors' domestic supply of premium quality Sunkist oranges and attempted to acquire more shipping space than it needed, as well as Sunkist's admitted refusal to sell respondents pool oranges. Appendix at pp. 9-10. The court concludes that these acts unreasonably restrained trade, but then excuses its failure to explain how such restraint occurred by ruling no proof of effect need be shown to sustain the liability verdict. *Id.* In sum, the decision below rests squarely on the proposition a § 1 case may

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[9]The opinion simply fails to address how "unlawful purpose" without more will satisfy the obvious requirement of § 1 of the Sherman Act (15 U.S.C. § 1) that defendant's act be in restraint of trade. *See, e.g., Standard Oil Co. v. United States,* 221 U.S. 1 (1910).

[10]The court below states Sunkist did not challenge a jury instruction using the disjunctive. Appendix at page 9. The court is in error; there was no such jury instruction. The jury instruction read "purpose *and* effect." R.T. 5203.

be proved if there is sufficient evidence of unlawful purpose alone.

This holding makes meaningless the statutory command of § 4 of the Clayton Act that a private party is permitted to maintain a treble damage action only when the unlawful acts have resulted in injury to his business or property. The Court has repeatedly held that a private party must prove such injury if he is to be able to maintain his action. *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 114 n. 9 (1969); *Hanover Shoe v. United Shoe Mach. Corp.,* 392 U.S. 481, 488-489 (1968); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 372 (1927). However, the court below has permitted recovery in a private antitrust action solely on proof of motive, regardless of proof of effect.

The implications of removing any requirement of proof of injury resulting from the alleged violation are sharpened by the Ninth Circuit's affirmation of respondents' method of calculating damages.

Although the Court has long recognized that the method of calculation of damages in an antitrust case need not be overly precise, particularly where the market has been disrupted by the defendant, *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946), the court below has carried that rule to the point where it obliterates a far more significant ruling of this Court: damages must flow from the alleged antitrust violation. *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 262 (1972); *Zenith Radio Corp. v. Hazeltine Research, supra,* 395 U.S. at 114; *Perma Life Mufflers v. International Parts,* 392 U.S. 134, 143-144 (1968) (White, J., concurring).

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Respondents based their liability case on certain specific acts of Sunkist, principally the refusal to sell them pool oranges, but in calculating their damages, respondents ignored those specific acts altogether. They premised their damage proof entirely upon a previously unchallenged act never tied to the alleged violation, Sunkist's competing sales in the Hong Kong market. The damages therefore did not flow from the acts which allegedly proved the unlawful purpose.

As noted above, respondents admitted they had no interest in exporting pool oranges after Sunkist entered the market because respondents' uniformly high commissions disabled them from competing with Sunkist in the sale of pool oranges. Therefore, whatever the illegality in the abstract of the refusal to deal in pool oranges, it is clear that it had no impact on respondents.

As a consequence, respondents' damage evidence did not relate to the refusal to deal (or, for that matter, any other specific act on which the liability verdict was based). Respondents made damage projections based on their respective market shares prior to 1966, which simply means taking the market as it was after 1966, removing Sunkist as a competitor and dividing Sunkist's sales among themselves according to their pre-1966 shares. They did this even though they never claimed or attempted to prove Sunkist's presence in the market was itself unlawful. The result was a damage figure which simply substituted respondents as the sellers of the oranges Sunkist actually sold.

The Ninth Circuit's approval of this method of calculating damages is undermined by its own concession that Sunkist could enter into the agency agreement with Reliance, but could not engage in certain

other acts, such as the refusal to sell pool oranges to competitors. Appendix at p. 9. In other words, after pinning its affirmance of the liability verdict on an illegal purpose derived from several specific acts, the Ninth Circuit finds that damages need not relate to those acts at all but to a previously unchallenged activity —Sunkist's competitive sales to Hong Kong.

On this point, the Ninth Circuit's decision conflicts with the Third Circuit's decision in *Brunswick*. 523 F.2d 262 (1975). Plaintiffs in that case attempted to formulate damages based on the assumption that the acquired bowling centers would have gone out of business but for the illegal acquisitions by Brunswick. The Third Circuit rejected such proof absent a finding by the jury that the centers would have failed. *Id.* at 276. In essence, the Third Circuit put the burden on the plaintiffs to demonstrate the impact of the illegal acts on their own businesses. The Ninth Circuit in Sunkist's case would excuse any such requirement by allowing the damage evidence to stand on the basis of speculation that the jury *might* have concluded that Sunkist would not have entered the market but for the illegal conspiracy. Appendix at p. 17. However, respondents made no such claim at the liability trial, introduced no evidence on the point, and the jury was neither instructed on the point nor asked to make a finding on it at either the liability or damage phase of the bifurcated trial.

The net effect of the Ninth Circuit's decision is that treble damage recoveries may be based upon losses caused by any act of a defendant contemporaneous with its possession of an unlawful purpose—whether or not that act is the basis for the finding of unlawful purpose.

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2. The Opinion Below Significantly Expands the Test of Monopoly Power Set Forth in United States v. Grinnell Corp., 384 U.S. 563, 571 (1966), by Sustaining a Finding of Monopoly Power Based Solely on a Market Share of 45-62%.

The Ninth Circuit in this case affirms the judgment of the district court on the basis of a jury finding that Sunkist monopolized a relevant market defined by respondents as "oranges grown in California and Arizona for export to Hong Kong." The Ninth Circuit interpreted that market to be the distribution of oranges from the United States to Hong Kong[11] and affirmed the judgment even though Sunkist had a share of the distribution market which after the first year fluctuated between 45% and 62%.

Although the Ninth Circuit acknowledged that monopoly power could not be inferred from such a low market share, Appendix at p. 12,[12] the court nonethe-

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[11]In attempting to make their monopolization case, respondents did not claim Sunkist had monopoly power in the distribution market, but relied on Sunkist's 70-75% share of the production of oranges in California and Arizona ("the supply market"). As a result, the jury was led to believe Sunkist violated § 2 on the basis of that 70-75% figure. However, the 70-75% figure is only relevant if Sunkist could be charged with monopolizing the supply market, which obviously could not properly be charged given the facts of this case. *Compare Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). The Ninth Circuit refused to accept that respondents' definition of the relevant market, "oranges grown in California and Arizona for export to Hong Kong," had been intended by respondents to mean the supply market. Therefore, in order to affirm the monopolization verdict, the Ninth Circuit was forced to find Sunkist monopolized the distribution market, where Sunkist had a much lower market share. (Appendix at p. 11.)

[12]Judge Wyzanski in *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 346 (D. Mass. 1953), *aff'd per*

less sustained the § 2 verdict by reference to the language of *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), relating to the ability of a defendant to control prices or exclude competition.

In doing so, the Ninth Circuit departs from well-settled law. Not only does the Ninth Circuit hold that someone with as little as 45% of the relevant market may have monopolized, but also it concludes that the monopoly power test of *Grinnell* may be satisfied by facts which fail to show any ability to control prices or exclude competition. Specifically, the Ninth Circuit relies on two facts: (1) that none of Sunkist's competitors had over 12% of the market after 1966; and (2) that Sunkist controlled the supply market. Appendix at pp. 12-13. The court does not evaluate the significance of either fact in terms of Sunkist's power to control prices or exclude competition in the distribution market.

It is fair to attribute the court's lack of evaluation to the failure of these facts to prove monopoly power. The relative size of a single competitor does not necessarily suggest any relative economic power of Sunkist, particularly when its competitors are allied in a Webb-

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curiam, 347 U.S. 521 (1954), found that the possession of not over 50% of the market did not constitute monopoly power, and the same district judge who tried the present case below wrote in an opinion handed down only one year after trying this case that a 42% market share "does not approach the percentage shares which have been held to be monopoly shares." *Jack Winter, Inc. v. Koratron Company, Inc.*, 375 F.Supp. 1, 68 (N.D. Cal. 1974).

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Pomerene Association.[13] Also, Sunkist's control over the supply market is obviously of limited significance to finding monopoly power in the distribution market because Sunkist cannot control the disposition of its own fruit sold in the domestic market. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).[14] In fact, the undisputed evidence shows Sunkist had no power either: (1) to control its competitors' fixed uniform prices, which were consistently higher than Sunkist's, or (2) to exclude those competitors from the market, as evidenced by the exporters' retention of a large share of the Hong Kong business, despite respondents' allegations that their exclusion from that market was precisely the goal Sunkist was consciously attempting to achieve.[15]

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[13]In *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948), the Court noted "that in assessing whether an acquisition violated § 2 of the Sherman Act, the strength of competitors was a consideration." This consideration has been carried forward in cases brought under § 7 of the Clayton Act (15 U.S.C. § 18). *See, e.g., F.T.C. v. Procter & Gamble*, 386 U.S. 568, 578 (1967). However, the Ninth Circuit's recitation that Sunkist is relatively large in comparison with its competitors does not compel any conclusions about monopoly power, and in this case, where the exporters have increased their actual sales volumes substantially since 1966 and cut down Sunkist's market shares, any such inference is inappropriate. (SK 4141.)

[14]Control over the supply market may be significant when the defendant is in fact the only real source of supply. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). However, in this case Sunkist sold its oranges into the domestic market and plaintiffs could and did turn to that market for their supplies, where Sunkist could not control their resale.

[15]The court below dismissed Sunkist's contention that it had acquired its position in the distribution market by its

In reality, therefore, the court's opinion sanctions a finding of monopolization based solely on a percentage market share which heretofore has been held insufficient, raising an important question of antitrust law which should be reviewed by this Court.

3. The Opinion Below Raises a Conflict in the Circuits on the Issue Whether an Association Has Standing to Seek Equitable Relief Under the Antitrust Laws for the Benefit of Its Members.

The Ninth Circuit has concluded the Association can seek injunctive relief on behalf of its members even though it was not itself threatened by antitrust violations. This decision directly conflicts with a recent decision of the Second Circuit. *Nassau Cty. Ass'n of Ins. Agts., Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 n. 4 (2d Cir. 1974), *cert. denied*, 419 U.S. 968 (1974).

The Ninth Circuit starts with the erroneous premise that standing to seek injunctive relief is governed by § 4 of the Clayton Act (15 U.S.C. § 15) rather than by § 16 (15 U.S.C. § 26), which the Ninth Circuit ignores. Appendix at pp. 20-22. It is § 16, however which specifically governs the right of an association to seek injunctive relief. The distinction between an

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more efficient, less costly agency agreement with Reliance. The court concluded the overt acts alleged by respondents, such as Sunkist's demand for excess shipping space, could justify the jury's finding that Sunkist had wilfully acquired its position. Appendix at page 13. However, neither respondents nor the Ninth Circuit ever demonstrated how those acts interfered with exporters' sales in any manner whatsoever.

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assignment of a claim for past damages and an assignment of a claim for prospective injunctive relief is a crucial distinction that the Ninth Circuit apparently failed to grasp. For instance, the case it cites for the proposition that antitrust claims are assignable, *Northern California M.D. Ass'n v. Interment Ass'n of California,* 120 F.Supp. 93, 94-95 (S.D. Cal. 1954), involves only a claim for damages brought under § 4 of the Clayton Act and does not involve injunctive relief under § 16.

Under § 16, only a party showing threatened loss or damage personal to him may seek injunctive relief. *United States v. Borden Co.,* 347 U.S. 514, 518 (1954). The Association could claim no such loss here because it has never been in the business of exporting oranges. Only the assignors are in the exporting business and the injunctive relief can protect only them. In other words, the Association does not meet the standing requirements of *Borden;* nor is it the "real party in interest" for purposes of Rule 17 of the Federal Rules of Civil Procedure.[16]

Because the Association itself is not threatened, the Ninth Circuit is in conflict with both the Second and Eighth Circuits, which have held that an association

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[16]The test for whether an association is the real party in interest for purposes of Fed. R. Civ. P. 17 has been stated to be "whether relief that may be granted will either redound to the benefit of the party alleged to have standing, or cause the alleged party to suffer damage". *Contract Buyers League v. F & F Investment,* 300 F.Supp. 210, 231 (N.D. Ill. 1969), *aff'd* 420 F.2d 1121 (7th Cir. 1970), *cert. denied,* 400 U.S. 821 (1970). Here the assignors rather than the Association are the real parties, for they are the only ones who benefit from the injunctive relief.

with no stake in the outcome could not enforce the rights of its members. *Nassau Cty. Ass'n of Ins. Agts., Inc. v. Aetna Life & Cas. Co., supra; Farmers Co-op. Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 103 (8th Cir. 1942).[17]

Conclusion.

For the foregoing reasons, a writ of certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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March 15, 1976

[17]The Ninth Circuit decision also conflicts with *Contract Buyers League v. F & F Investment*, 300 F.Supp. 210, 231 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F. & F. Investment* 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); *Cordova v. Bache & Co.*, 321 F.Supp. 600, 604 (S.D. N.Y. 1970); *South Carolina Council of Milk Producers, Inc. v. Newton*, 241 F.Supp. 259 (E.D.S.C. 1965), *rev'd on other grounds*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1967); *Northern California M.D. Ass'n v. Interment Ass'n of California*, 120 F.Supp. 93, 94 (S.D. Cal. 1954).

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APPENDIX.

Order Denying Petition for Rehearing.

In the United States Court of Appeals, for the Ninth Circuit.

Pacific Coast Agricultural Export Association, Plaintiff-Appellant, Cross-Appellee, v. Sunkist Growers, Inc., Defendant-Appellee, Cross-Appellant. Nos. 74-1093, 74-1128.

M-C International, Inc., Plaintiff-Appellant, v. Sunkist Growers, Inc., et al., Defendants-Appellees, Cross-Appellants. Nos. 74-1094, 74-1129, 74-1130.

Filed: Jan. 29, 1976.

Before: DUNIWAY, ELY and WRIGHT, Circuit Judges.

The Petition for Rehearing on Corrected Opinion filed December 31, 1975 has been considered and is denied.

Order Denying Rehearing.

In the United States Court of Appeals, for the Ninth Circuit.

Pacific Coast Agricultural Export Association, Plaintiff-Appellant, Cross-Appellee, v. Sunkist Growers, Inc., Defendant-Appellee, Cross-Appellant. Nos. 74-1093, 74-1128.

M-C International, Inc., Plaintiff-Appellant, v. Sunkist Growers, Inc., et al., Defendant-Appellee, Cross-Appellant. Nos. 74-1094, 74-1129, 74-1130.

FILED: Dec. 17, 1975.

Before: DUNIWAY, ELY and WRIGHT, Circuit Judges.

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The petition for rehearing is denied. The opinion is corrected in the following particulars:

A footnote 9 is added on page 6, line 22 (slip opinion at p. 5) following the words "SECTION 1 CLAIM," to read:

> [9]Damage issues under all claims are discussed in Section V, *infra*.

At page 7, line 29 (slip opinion at p. 6), following the words "acquired by plaintiffs", there will be added a sentence,

> Early in 1966 Sunkist not only stopped issuing quotations, but also terminated export sales, to domestic exporters.[10]

Footnote 10 will read:

> These facts also support the conclusion that unreasonable restraint of trade was effectuated. However, we need not reach this issue since unlawful purpose alone is enough to support a finding of an "actionable conspiracy." *Bushie, supra,* 460 F.2d at 120.

There will be deleted from the opinion at page 8, line 10 (slip at 6-7) the entire paragraph which ends at line 16, together with the footnotes pertaining to that paragraph.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Pacific Coast Agricultural Export Association, *Plaintiff-Appellant, Cross-Appellee,* vs. Sunkist Growers, Inc., *Defendant-Appellee, Cross-Appellant.* Nos. 74-1093, 74-1128.

M-C International, Inc., *Plaintiff-Appellant,* vs. Sunkist Growers, Inc., et al., *Defendants-Appellees, Cross-Appellants.* Nos. 74-1094, 74-1129, 74-1130.

[November 11, 1975].*

Appeal from the United States District Court for the Northern District of California.

Before: DUNIWAY, ELY, and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

In this private antitrust action several parties appeal and cross-appeal from aspects of a judgment for treble damages, attorneys' fees and injunctive relief. We affirm.

Plaintiff-appellant Pacific Coast Agricultural Export Association (the Association) is a Webb-Pomeraine association[1] of fresh fruit exporters who among other things serve as middlemen in exporting oranges to Hong Kong and the Far East. Plaintiff-appellant M-C

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*Reprinted here as corrected on December 17, 1975.

[1]The Webb-Pomeraine (sic) Act [15 U.S.C. §§ 61-65], allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy an exemption from antitrust liability for that export trade.

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International, Inc. (M-C) also exports oranges to Hong Kong.

Defendant and cross-appellant Sunkist Growers, Inc. (Sunkist) is a federated agricultural cooperative comprised of several thousand Arizona and California citrus fruit growers who grow and pack citrus fruits for sale in the United States and abroad. Defendant and cross-appellant Reliance Commercial Enterprises, Inc. (Reliance) conducts business as a broker of citrus fruits in the Far East.

As assignee of the rights of seven of its members, the Association charged Sunkist with violating Section 1 of the Sherman Act [15 U.S.C .§ 1], by conspiring with Reliance to restrain trade, and with violating Section 2 [15 U.S.C. §2], by conspiring and attempting to monopolize and monopolizing exports from Arizona and California to Hong Kong. In a separate action M-C similarly charged both Sunkist and Reliance. The actions were consolidated for trial by agreement.[2]

The jury returned a general verdict and answered 16 special interrogatories in favor of plaintiffs, finding that Sunkist and Reliance had engaged in each alleged anticompetitive practice. The jury fixed damages at $238,704 for the Association's assignors, and $2,363 for M-C.[3]

The district court thereafter awarded treble damages and attorneys' fees of $205,250.[4] It ordered the termina-

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[2]A third action, *Lepinay v. Sunkist Growers, Inc.*, No. C-69-332-CBR, was also consolidated and heard with these cases, but the jury verdict that Lepinay was not injured by any acts of Sunkist or Reliance was not appealed.

[3]Sunkist and Reliance also counterclaimed under the antitrust laws. Plaintiffs prevailed on these counterclaims which are not at issue on appeal.

[4]Of this amount, $5,250 was awarded in connection with defendants' motions for judgment n.o.v. or new trial.

tion of defendants' exclusive sales agreement, and enjoined Sunkist from refusing to sell oranges through its domestic and export departments to qualified buyers at competitive prices. The court refused to enjoin Sunkist from selling to Hong Kong importers, either directly or through nonexclusive agents, and also denied plaintiffs' request that Sunkist be dissolved.

Sunkist and Reliance object to any form of equitable relief and on cross-appeal urge that the verdicts be set aside for procedural irregularities, errors in the admission of evidence and insufficiency of evidence to support a verdict against either defendant. They also urge that plaintiffs failed to prove actual damages and that the attorneys' fees are excessive.

The Association and M-C argue that the district court's refusal to order dissolution was an abuse of discretion and urge that at the very least the court should have enjoined Sunkist from selling oranges, directly or indirectly, to Hong Kong for a period of six years (a period equal to that of the alleged violations).

I.
FACTS

Sunkist citrus growers produce about 75% of the oranges grown in Arizona and California. They process the fruit through 105 packing houses, each of which uses its own brand name as well as the Sunkist trademark. The packing houses are grouped into 20 sales exchanges.[5]

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[5]Sunkist's operations have not changed markedly from those described by the Supreme Court in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 386-89 (1967).

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Domestic purchasers may request specific packing house brands, although a federal marketing order[6] limits the number of brand oranges which each packing house can sell in a given time period.

Hong Kong importers purchasing from Sunkist's export department may not specify particular brands, although they may specify a general varietal preference for central valley or southern California oranges. While no federal marketing order limits export sales, Sunkist's export department allocates sales, by means of "pooling" arrangements, largely on a pro rata basis among the several packing houses.

Until 1966, Sunkist's export department relied upon numerous exporting companies, including members of the Association, to generate and maintain sales to Hong Kong importers. In March of that year, Sunkist terminated these arrangements and began direct sales to Hong Kong through Reliance, its new exclusive agent there. Sunkist performed all export functions, including handling, shipping and insurance. Reliance, through its Hong Kong manager Newman Wu, obtained letters of credit from Hong Kong importers, transmitted orders and price quotations to Sunkist, and generally represented Sunkist's interests in Hong Kong.

In the six months following its agreement with Reliance, Sunkist (which had previously sold direct to Hong Kong only upon occasion) was able to capture nearly 70% of the market for American oranges sold there.[7] The plaintiffs, who had previously been largely

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[6]7 C.F.R. 907, 908 (1975), issued pursuant to the Agricultural Marketing Act [7 U.S.C. §§ 601 *et seq.* (1970)].

[7]The percentage sold by plaintiffs and other exporters later increased somewhat, ranging between 38.1% and 55.5% from

supplied by Sunkist's export department, were now able to obtain Sunkist oranges only on the domestic market. Evidence was introduced from which the jury might have inferred that the plaintiffs were at times prevented from purchasing even on the domestic market.

II.

SCOPE OF CAPPER-VOLSTEAD IMMUNITY

As a threshold matter we must determine the extent to which the federal antitrust laws apply to Sunkist's activities. Sunkist claims that it presently[8] qualifies as a grower cooperative under Section 1 of the Capper-Volstead Act [7 U.S.C. § 291], and that therefore its members' joint activities enjoy a broad exemption from the antitrust laws under that act and Section 6 of the Clayton Act [15 U.S.C. § 17]. *See generally Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 210-18 (9th Cir. 1974); Annotation, 20 A.L.R. Fed. 924 (1974).

1967 to 1971. Although an improving overall market in Hong Kong allowed three of the Association's assignors to attain 1970 volume sales exceeding comparable pre-1966 figures, neither M-C nor any of the assignors has regained its pre-1966 share.

[8]In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), the Supreme Court held that the Capper-Volstead Act does not exempt associations with non-grower packing house members. Sometime in 1968 Sunkist reorganized to bring itself within the Act's exemption, as interpreted by the Court. In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 355 F. Supp. 408 (C.D. Cal. 1971), the court determined that the 1968 reorganization had (sic) Sunkist within the protection of the Act.

The district court in the case at bar instructed the jury that Sunkist was entitled to the protections of the Capper-Volstead Act. We assume for the purpose of this case that Sunkist qualifies but need not decide the question. *See generally* 20 ALR Fed. 913, *et seq.* (1974).

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Sunkist contends that the designation of Reliance as its exclusive agent in Hong Kong was protected conduct under the language of Capper-Volstead Act § 1 providing that:

> [s]uch [cooperative] associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

It is well settled, however, that the rights of growers to market cooperatively cannot be deemed to authorize any combination or conspiracy with others which unreasonably restrains interstate or foreign commerce. *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939). The court instructed the jury that to find a violation of the Sherman Act, Section 1, the jury had to find that "the purpose and effect of such an agreement is unreasonably to exclude the former distributors [plaintiffs] from engaging in the trade in question." To this instruction no party objected. [*See* F.R. Civ. P. Rule 51.]

Nor does the Act immunize cooperatives engaged in competition-stifling practices from actions under the antimonopolization provisions of Sherman Act § 2. *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 463 (1960); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra*, 497 F.2d at 216. *See also Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association*, 358 F.2d 115 (9th Cir. 1966).

The district court properly instructed the jury as to the scope of Capper-Volstead immunity, and there was no challenge by any party.

III.
SECTION 1 CLAIM[9]

The unchallenged jury instruction on the Section 1 claim fairly embodied the law of this circuit which requires evidence of an agreement the purpose or effect of which is to unreasonably restrain trade. *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970). The jury was properly instructed that the formation of an exclusive agency agreement was not illegal *per se*. *Hawaiian Oke* at 76. A good faith, economically motivated decision to switch exporters, as Sunkist has correctly noted, would not subject it to Section 1 liability. *Alpha Distributing Co. v. Jack Daniel Distillery*, 454 F.2d 442, 452 (9th Cir. 1972). Rather, the plaintiffs were required to show that Sunkist's refusal to deal was motivated by a desire to exclude the plaintiffs from the market or to accomplish some other anti-competitive objective. *Bushie*, 460 F.2d at 119-20; *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1215 (9th Cir. 1970). Deciding Sunkist's motivation was peculiarly a question for the jury. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927). Its determination is conclusive unless erroneous as a matter of law. *Id.*

The jury's finding that defendants had unlawfully agreed to unreasonably restrain trade is amply supported by the evidence. There were communications from Re-

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[9]Damage issues under all claims are discussed in Section V, *infra*.

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liance to Sunkist seeking restrictions on the supply of domestic oranges available to the exporters, followed by Sunkist actions which could be interpreted as attempts to prevent regional exchanges under its control from selling oranges to plaintiffs. Sunkist attempted to secure more shipping space than needed to accommodate its own orders, knowing that plaintiffs might be foreclosed thereby from shipping many of their orders. Sunkist supplied Reliance with a list of Hong Kong customers acquired by plaintiffs. Early in 1966 Sunkist not only stopped issuing quotations, but also terminated export sales, to domestic exporters.[10]

Although one or more of these actions could be regarded as reasonable responses to competitive pressures, *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974); *Joseph E. Seagram & Sons, supra,* the cumulative evidence was sufficient to permit the jury's finding that they were illegally motivated. *Cf. DeVoto v. Pacific Fidelity Life Insurance Co.*, 516 F.2d 1, 5-6 (9th Cir. 1975). The inference of an implied agreement can, as in this case, be a sufficient basis upon which to predicate liability under Section 1. *Blankenship v. The Hearst Corp.*, 519 F.2d 418, 428 (9th Cir. 1975).

IV.
SECTION 2 CLAIM

The record shows it was well within the province of the jury to find that defendants had monopolized, attempted to monopolize and conspired to do so.

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[10]These facts also support the conclusion that unreasonable restraint of trade was effectuated. However, we need not reach this issue since unlawful purpose alone is enough to support a finding of an "actionable conspiracy." *Bushie, supra,* 460 F. 2d at 120.

A. *Monopolization.*

The jury was properly instructed that plaintiffs had the burden of proving: (a) that the relevant market was the one claimed, *viz.* "oranges grown in Arizona and California for export to Hong Kong;" (b) that Sunkist possessed monopoly power in the relevant market, and (c) that Sunkist committed acts which constituted monopolization of that market. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Defendants argue that the phrase "oranges grown in Arizona and California for export to Hong Kong" describes a supply, not a distribution, market and that plaintiffs' failure to show illegal monopolization in the supply market frustrates the Section 2 claim.

Surely this argument must fail. In the context of this case it is abundantly clear that the relevant market is that of distribution. In its complaint the Association charged Sunkist with "monopolizing . . . all or most of the *trade and commerce* in citrus fruits with . . . Hong Kong," and with specific efforts to "monopolize such trade and commerce." (Emphasis added.) In its complaint M-C charged monopolization and restraint of trade in "the sale and shipment of citrus fruits from California to Hong Kong."

It would be absurd for plaintiffs to define the relevant market as supply, when throughout the trial it was conceded that Sunkist enjoyed Capper-Volstead protection for production activities. Rather, plaintiffs attempted to show, and did show, that Sunkist's control of supply was employed to extend its monopoly illegally into distribution. *Compare Otter Tail Power Co. v. United States,* 410 U.S. 366, 377 (1973); *United*

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See also States v. Griffith, 334 U.S. 100 (1948). *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 57, 277-79 (1973).

Defendants also suggest the export of domestic "brand" and export "pool" oranges, constituted separate submarkets after 1966. They argue that plaintiffs were interested only in the domestic "brand" market, and that any alleged monopolization of "pool" is in-submarket did no damage to plaintiffs. Th any sufficient evidence in the record to show demand exactitude the degree of cross-elasticity ry was between "brand" and "pool" oranges. The Kong, free to view these as substitute goods in H and it appears to have done so.

Sunkist's control of the Hong Kong exp market ranged from 45 to 70% during the perio 967 to 1971. Some past decisions have required er per-centages to show monopoly power. *See, United States v. Aluminum Co. of America*, 148 d 416, 424 (2d Cir. 1945). However, it is now settled that market share, while being perhaps the impor-tant factor, does not alone determine th presence or absence of monopoly power. In *Unite tates v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). e Court stated:

> In *United States v. du Pont & Co.*, 51 U.S. 377, 391, we defined monopoly pow as "the power to control prices or exclude co etition." The existence of such power ordinar may be inferred from the predominant share of market.

Here Sunkist's competitors, although org zed into a trade association, were relatively sma with no

single competitor controlling over 18% of the market before, or 12% of the market after, Sunkist's entry. Moreover, Sunkist's acknowledged control over the supply market clearly facilitated the acquisition of monopoly power in the distribution market. These facts adequately support the jury's finding that defendants possessed monopoly power in the relevant market.

Several acts of defendants could readily be interpreted by the jury as acts of monopolization. Among these were Sunkist's attempts to restrict the supply of oranges available to plaintiffs, to divert domestic fruit from plaintiff for direct sale to Hong Kong importers, to fraudulently persuade plaintiffs to surrender their customer lists, and to demand shipping advantages for its export operations commensurate with and exceeding its controlling share of the supply market.[11] While Sunkist asserts that its ability, based upon superior efficiency and diligence, to charge lower prices than the middlemen-exporters and from its willingness to accept lower and more reasonable profit margins, it was open for the jury to conclude that more than superior techniques were involved in the rapid rise to market dominance.

B. *Attempt to Monopolize.*

The district court instructed the jury that attempted monopolization must be shown by specific intent to monopolize a relevant market, together with a "wrongful" act (or acts) in furtherance of that intent which "create the likely probability" of monopolization. *Compare Swift & Co. v. United States,* 196 U.S. 375,

[11]The same acts may constitute both an unreasonable restraint of trade and monopolization. *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States,* 362 U.S. 458, 463 (1960).

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396 (1905) (requiring "dangerous probability" of success).

Sunkist argues that language in *Hallmark Industry v. Reynolds Metal Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), requires a finding of "predatory conduct directed to accomplishing the unlawful purpose" to support an attempted monopolization charge. Even assuming the applicability of *Hallmark* to this case,[12] Sunkist's argument is unavailing. *Hallmark* suggests that the requisite "dangerous probability" of success can be inferred from either specific intent coupled with monopoly power *or* from "proof of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose." 489 F.2d at 12. Since the jury specifically found, in answer to written interrogatories, both specific intent and monopoloy power, the *Hallmark* test is satisfied.[13]

C. *Conspiracy to Monopolize.*

There was sufficient evidence in the record to permit the properly instructed jury to conclude that Sunkist and Reliance had conspired with the specific intent to monopolize a line of commerce. While an agreement for exclusive distribution of one's own product does not of itself constitute a conspiracy to monopolize,

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[12]The decision was filed more than one year after the verdict in the instant case.

[13]Although the jury found the existence of "monopoly power" in answer to an interrogatory dealing with the monopolization charge, it is clear that the jury had the same "monopoly power" in mind in connection with the attempted monopolization charge. Likewise, the jury's finding, in connection with the monopolization charge, of a conspiracy constituting an unreasonable restraint of trade was surely kept in mind during deliberation of the attempted monopolization charge.

Bushie v. Stenocord Corp., 460 F.2d 116, 120 (9th Cir. 1972), there was also evidence in the record supporting inferences of joint action to preclude exporters from shipping space, joint use of exporters' customer information, and the exclusion or restriction by agreement of exporters from domestic as well as export "pool" oranges.

V.
DAMAGES

Sunkist correctly notes that a private antitrust verdict cannot be sustained without proof of injury. *Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972). The district court so instructed the jury as to each charge, and the requirement was reiterated as to each charge in the written interrogatories.

Sunkist argues *inter alia* that the appellants' damages did not arise proximately from the alleged illegal activity, that the trial judge erroneously allowed a hypothetical question on the damages issue which assumed facts not in evidence, and that market share projections were improper.

A. *Damage Causation.*

Sunkist's contention, like that discussed above in dealing with the "relevant market," is that plaintiffs lost no sales or profits from insufficient supply of export "pool" oranges, since they would not have purchased them even if they were available. We pause here only briefly. As previously stated, the jury could reasonably conclude that there was but one market for Sunkist oranges, be they "pool" or "brand". It could likewise conclude that either the refusal to sell

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export "pool" oranges, or the restriction of plaintiffs' ability to purchase domestic "brand" oranges, or a combination of both, proximately led to diminution of plaintiffs' market share. Such clearly constitutes "reasonable probability [of] the existence of some casual connection between defendant's wrongful act and some loss of anticipated revenue." Flintkote Co. *v. Lysfjord,* 246 F.2d 368, 392 (9th Cir.), *cert. denied* 355 U.S. 835 (1957). *See also Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.,* 416 F.2d 71, 85-88 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970).[14]

B. *The Hypothetical Question Allegedly Assuming Facts Not In Evidence.*

Defendants contend that, notwithstanding Sunkist's illegal agreements with Reliance, Sunkist would have competed with plaintiffs in the post-1966 export trade. They therefore object to the district court's allowance of the following hypothetical question propounded by plaintiffs' counsel to each of plaintiffs' witnesses on damages:

> Q. [Plaintiffs' Counsel]: . . . do you have an opinion as to the number of oranges Liberty Gold [or each other exporter] would have sold in Hong Kong had you been able to purchase oranges from Sunkist's export department as you had prior to 1966, *and assuming that Sunkist was—did not sell oranges in Hong Kong for the period subsequent to March 1966?* (Emphasis added.)

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[14]We are mindful of the greater quantum of proof requisite to show the fact of damage as distinguished from the amount thereof. *Flintkote, supra,* 246 F.2d at 392.

This question, defendants argue, induced the finding of an improper amount of damages since much of plaintiffs' diminished market share could have resulted from legitimate competition by Sunkist.

This argument is patently frivolous. Defendants' illegal seizure of a market share to the plaintiffs' injury is not protected merely because the defendant might have achieved the same result by legal means. Moreover, the evidence was conflicting, and the jury may well have concluded that Sunkist would not have taken the risks of entering the export market but for the assurance of an inordinately large return.[15] Such a conclusion complies with the *Flintkote* standard, *supra*.

On numerous occasions the district court instructed the jury, without challenge, of the need to find a causal connection between the unlawful conduct and injury to plaintiffs. In view of this we cannot say that the jury verdict was influenced improperly by the hypothetical question.

C. *Market Share Projections.*

Aside from Sunkist's argument that it would have competed in the post-1966 Hong Kong export market even absent the illegal agreement with Reliance, Sunkist and Reliance also contend that in any event the post-1966 expansion of the Hong Kong market was due solely to their innovations and skill in promoting the sale of American oranges and achieving efficiencies in their distribution to Hong Kong importers. Therefore, they argue, the district court erred in allowing plaintiffs

[15]Sunkist, of course, could have phrased the same question to plaintiffs' witnesses on cross-examination, but employing the opposite assumption that Sunkist would have entered the market directly even absent its agreement with Reliance.

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to predicate damage estimates on the theory that plaintiffs would have maintained their pre-1966 market shares in the expanding post-1966 market.

To rebut the defense evidence, plaintiffs offered proof that the market expansion occurring after 1966 came about at least in part because of a general increase in population and income in Hong Kong. Two experts testified that sales of American oranges to Hong Kong would have increased regardless of Sunkist's direct entry into the market.

Plaintiffs' method of measuring damages, known as the "before and after" theory, may be used only where there has been some showing that the market conditions in the two periods were similar but for the impact of the violation. *See Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 259-63 (1946). While this test would not allow a verdict to rest on bare allegations of lost profits and causation, the Supreme Court also ruled in *Bigelow* that:

> . . . . [I]n the absence of more precise proof, the jury could [infer] from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes,* that defendants' wrongful acts had caused damage to the plaintiffs.

Id. at 264. (Emphasis added.)

While plaintiffs' evidence as to the causes of the change in market scope was not overwhelming, it was sufficient to support a "just and reasonable estimate of the damage" by the jury. 327 U.S. at 264. A defendant whose wrongful conduct has rendered difficult

the ascertainment of the amount of damages suffered may not complain that they cannot be measured with exactness and precision. *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Hobart Brothers Co. v. Gilliland*, 471 F.2d 894, 903 (5th Cir. 1973).

D. *Other Objections.*

Sunkist and Reliance allege other errors as to damages which deserve brief mention.

The suggestion that the period of damage be limited to the latter half of 1967 is frivolous. There was evidence of continuous illegal conduct, and resultant injury, from 1966 through 1971. The jury was well within its province to conclude that in fact injury occurred throughout that period.

Plaintiffs' expert witnesses who testified at the trial on damages were properly qualified as experienced businessmen capable of providing information and opinions based on practical experience. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 239 F. Supp. 51, 76 (N.D. Ill. 1965), *rev'd on other grounds*, 388 F.2d 25 (7th Cir. 1967), *aff'd in part and rev'd in part on other grounds*, 395 U.S. 100 (1969). To avoid any prejudice, the district court properly cautioned the jury as to the limits of the witnesses' expertise.

VI.

EQUITABLE RELIEF

Sunkist objects to all injunctive relief granted by the district court and the Association in turn requests that Sunkist be dissolved, or in the alternative that broader injunctive relief be granted. Each argument will be discussed below.

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A. *Alleged Impropriety of Injunctive Relief Granted.*

1. *Standing.*

Sunkist contends that the Association lacks standing to obtain any form of equitable relief.[16] Further, it contends, the *de minimis* damage suffered by M-C ($2,363) does not in equity justify the extensive injunctive relief granted.

Section 4 of the Clayton Act [15 U.S.C. § 15], provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." While an association may not sue on its own to assert the rights of its members under the antitrust laws, it may sue as assignee of the legal rights of others. *Northern California Monument Dealers Ass'n v. Interment Ass'n of California,* 120 F. Supp. 93, 94-95 (S.D. Cal. 1954). As assignee, it steps into the shoes of its assignors. *Id.*

Sunkist concedes that the Association's members "assigned their claims to [the] Association for the purposes of this suit." It asserts, however, that the members could not and did not assign their "claims" for injunctive relief. The question of what rights and remedies pass with a given assignment depends upon the intent of the parties. *Northwest Oil & Refining Co. v. Honolulu Oil Corp.,* 195 F. Supp. 281, 286 (D. Mont. 1961).

Since in its complaint the Association recites the assignment of members' "claims," and thereafter prays

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[16]The contention was first made four and a half years after the filing of the complaint. The failure to timely object casts doubt on the argument that the lack of standing constitutes a bar. *See Environmental Defense Fund v. Environmental Protection Agency,* 465 F.2d 528, 530-531 n.1 (D.C. Cir. 1972).

for both damages and equitable relief,[17] it follows that the parties clearly attempted to assign both legal and equitable claims. We need only determine whether they could do so as a matter of law.

The question turns on whether the Association is the "real party in interest" within the meaning of Fed. R. Civ. P. 17(a). The basic purpose of the rule requiring that every action be prosecuted by the real party in interest is to protect a defendant from subsequent similar actions by one not a party to the initial action. *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied* 415 U.S. 935 (1974); *United Federation of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462, 470-71 and n. 34 (D.C. Cir.), *cert. denied sub nom.; Blount v. United Federation of Postal Clerks, AFL-CIO*, 396 U.S. 902 (1969); *Dubuque Stone Products Co. v. Fred L. Gray Co.*, 356 F.2d 718, 723 (8th Cir. 1966); *Celanese Corp. of America v. John Clark Industries*, 214 F.2d 551, 556 (5th Cir. 1954). There is here no likelihood that any member of the Association will sue subsequently, since the equitable relief granted redounds to the benefit of all members, whether or not they assigned claims to the Association.

Whether an unincorporated association may seek equitable relief for its members under Sections 4 and 5 of the Clayton Act [15 U.S.C. §§ 15 and 16], is clearly a matter of federal law. Fed. R. Civ. P. 17(b). *Cf. Klebanow v. New York Produce Exchange*,

[17]Under Fed. R. Civ. P. 2, all legal and equitable claims are to be joined in one "civil action." *See* 2 J. Moore, Federal Practice ¶2.01, at 303-07 (2d ed. 1975). Thus it is logical to assume the word "claim" includes both legal and equitable causes, absent evidence of contrary intent.

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344 F.2d 294, 296 (2d Cir. 1965). The Supreme Court has stated: "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). *See also NAACP v. Button*, 371 U.S. 415, 428 (1963); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 693-94 (D.C. Cir. 1971), and cases cited therein.

Our recent decision in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975), underscores this court's recognition that a private antitrust decree may and should be broad enough to restore competition in the relevant market. In that case we held:

> Injunctive remedies under § 16 may be as broad as necessary to ensure that "threatened loss or damage" does not materialize or that prior violations do not recur. . . . [W]e are confident that the pernicious manifestations or tendencies of an illegal vertical combination . . . are susceptible to direct injunctive restraint.

518 F.2d at 925. (Footnote omitted.)

These considerations compel us to conclude that, at least where, as here, the assignors are members of the trade association bringing suit, the assignee association may seek whatever equitable relief may be available to each assignor. This holding should both minimize the possibility of multiple lawsuits, and promote the broad remedial purposes of the antitrust laws.

2. *Propriety of the Relief Granted.*

The district court ordered that:

> 2. Sunkist be enjoined from refusing to make available to qualified purchasers oranges from the domestic department, regardless of the ultimate purpose for which that purchaser seeks the oranges; and
>
> 3. Sunkist be enjoined from refusing to sell oranges from its export department to any qualified exporters. The price to such exporters shall not exceed the net price at which Sunkist markets its oranges directly in Hong Kong. The net price shall be determined by deducting from quoted price in Hong Kong the cost of insurance, ocean freight, tolls, handling, commission to agents, and all other payments to third parties arising from the export of said oranges to Hong Kong.

Sunkist objects to the first paragraph on the ground that the relief granted will undermine the ability to market on a cooperative basis. However, the possibility that some packing houses may have to violate Sunkist's by-laws should not frustrate the district court's attempt to restore competition. *Compare Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-79 (1973) (otherwise valid contracts properly enjoined where they were part of a scheme to promote attempted monopolization and restraint of trade).

If Sunkist should ever find itself faced with the choice of complying with either the court's decree or a federal marketing order, it may petition the district court for guidance or modification. A similar petition might be in order if shortages should arise and Sunkist

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should need to apportion its available oranges among its regular customers.[18]

Sunkist also objects to the requirement that it sell export department oranges to "any qualified exporters." While it may be that plaintiffs are not in a position to buy such oranges at the going rates, once Sunkist's rates are lowered to the "net price" as ordered, the demand will undoubtedly rise. This order is well within the court's broad remedial discretion.

B. *Plaintiffs' Request for Dissolution or Broader Injunction.*

In considering plaintiffs' request for Sunkist's dissolution or an order enjoining it from selling oranges and Reliance from selling Sunkist oranges in Hong Kong for six years, the district court held that:

> even assuming arguendo that [the court] has the power to award such relief to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.

This court has subsequently ruled that the dissolution remedy is not available to private antitrust litigants. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d at 922. We indicated that extensive direct injunctive restraints would be appropriate where essential to prevent the "pernicious manifestations or tendencies" of unlawful anticompetitive activities. *Id.* at 925. In this case, however, the district court clearly found the requested

[18]The district court properly retained jurisdiction of the case to effectuate its decree as necessary.

relief unnecessary to restore plaintiffs' ability to compete in the Hong Kong market.

On the facts before it, the court might well have determined that an injunctive order of the sort sought by plaintiffs would be unworkable and superfluous, and that it might hinder rather than promote competition in the Hong Kong export market. *Cf. Ford Motor Co. v. United States,* 405 U.S. 562, 568, 573 (1972). The district court granted substantial injunctive relief aimed at restraining appellees' anticompetitive activities, and we cannot say that the relief was inadequate.

VII.
MISCELLANEOUS ASSERTIONS

A. *Alleged Misconduct by Plaintiffs' Counsel.*

Appellees contend that the district court should have granted judgment n.o.v. or in the alternative a new trial because of misstatements by plaintiffs' trial counsel at closing argument concerning Sunkist's "admission" of a conspiracy, the failure of Sunkist's accountants to testify, the treatment of employee salaries in determining lost profits, and other matters. In reviewing the record we are impressed not only with the frivolity of these claims, but also with the great care exercised by the district court in conducting the trial and cautioning the jury. There was no error.

B. *Attorneys' Fees.*

Appellees contend the attorneys' fee award (83% of single damages) is excessive as a matter of law. This court has recognized that determination of reasonable attorneys' fees requires consideration of a variety of factors. *Twentieth Century Fox Film Corp. v. Gold-*

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wyn, 328 F.2d 190, 221 (9th Cir. 1964). A consid-
ering all of the appropriate factors, the court ncluded
that because of the magnitude, complexity l length
of the litigation and the risk involved, a fixed centage
rule would be particularly inappropriate in is case
and the 83% figure was to be "attributed special
significance."[19] The court's action is clea within
the contemplation of the rule laid down in *ventieth Century Fox.*

VIII.
CONCLUSION

The judgment of the district court is in respects affirmed.

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[19]The district judge devoted five pages of his morandum opinion to a discussion of the factors to be c dered by a court in awarding counsel fees, in light of *Hr er Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. pp. 258, 302-303 (M.D. Pa. 1965). He commented in de on each of the eight factors. He noted "the presence of eminent counsel on both sides of this case with very substa l experience in antitrust litigation." He drew upon his ow nowledge of the time spent by counsel on "conferences, ar ents, and time spent on the case both prior to as well a uring the trial."

The court also demonstrated considerable know e of the contributions made by legal assistants to the attorn noting

> "As a matter of practice, most attorneys en d in the antitrust practice use such legal assistants, p ularly in digesting and indexing discovery and trial ma als, much of the work heretofore performed by relatively perienced lawyers. . . . As a matter of policy, the use paralegal help in this fashion greatly reduces the cost of l services to the public and is thus a practice to be enco ged."

The court then approved the award of fees for s paralegal help after adjusting it slightly downward.

We would be sorely pressed to find a case which the trial judge paid greater attention to the law and mstances in deliberating over the award of attorneys' fees.

Notice of Cross-Appeal.

United States District Court, Northern District of California.

Pacific Coast Agricultural Export Association, Plaintiff, v. Sunkist Growers, Inc., et al., Defendants. No. C-49691-CBR.

M-C International, Inc., Plaintiff, v. Sunkist Growers, Inc., et al., Defendants. No. C-69-311-CBR.

NOTICE IS HEREBY GIVEN that SUNKIST GROWERS, INC., defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment entered in these above-entitled actions on May 15, 1973, and from the Order Dismissing Counterclaims filed in the above-entitled actions on May 16, 1973.

DATED: October 12, 1973.

TUTTLE & TAYLOR Incorporated
WILLIAM A. NORRIS
HAROLD J. KWALWASSER
DALE V. CUNNINGHAM
COOLEY, GODWARD, CASTRO, HUDDLESON & TATUM
By /s/ William A. Norris
WILLIAM A. NORRIS, a member of the law firm of TUTTLE & TAYLOR Incorporated, Attorneys for Defendant, SUNKIST GROWERS, INC.

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Memorandum of Opinion and Order.

United States District Court, Northern District of California.

Pacific Coast Agricultural Export Association, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-49691-CBR.

M-C International, Inc., Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-69-331-CBR.

Robert Louis Lepinay, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-69-332-CBR.

Filed: May 11, 1975.

These actions were commenced on July 29, 1968, when plaintiff Pacific Coast Agricultural Export Association ("Export Association"), an unincorporated association organized under the Webb-Pomerene Act, 15 U.S.C. §§61-65, whose members assigned their claims to the Export Association for purposes of the suit, brought suit against Sunkist Growers, Inc. ("Sunkist"), alleging violations of the antitrust laws. Thereafter, plaintiffs Robert Lepinay and M-C International, Inc., filed complaints against Sunkist and Reliance Commercial Enterprises, Inc. ("Reliance"), on March 19 and August 14, 1969, respectively. On December 8, 1969, all three cases were consolidated for discovery, pre-trial, and trial proceedings by agreement of the parties. Specifically, it was alleged that in March 1966, Sunkist determined to sell its citrus fruit in Hong Kong directly through an exclusive agent there, Reliance, and thereafter refused to sell to plaintiff exporters any citrus fruit for export to Hong Kong through either the export pool or the domestic market. In

consequence, it was alleged that Sunkist, alone and in combination with Reliance, attempted, conspired, and did monopolize the interstate and foreign trade in the sale and shipment of citrus fruit from California to Hong Kong in violation of the Sherman Act. Plaintiffs therefore sought treble damages and attorneys' fees under §4 of the Clayton Act, 15 U.S.C. §15, and appropriate equitable relief, under 15 U.S.C. §26.

On August 17, 1971, the Court ordered that the issues of liability and damages be bifurcated for trial before the same jury. The liability phase of the trial was then tried to the jury beginning on September 11, 1972. It was both extensive, involving some 1000 exhibits, 8,194 pages of transcript, and 31 trial days, as well as extremely complex. Raised therein were questions concerning the status and function of export associations, such as plaintiffs', formed under the aegis of the Webb-Pomerene Act, 15 U.S.C. §§61-65, the scope of the exemption from the antitrust laws granted to agricultural cooperatives such as defendant Sunkist under the Capper-Volstead Act, 7 U.S.C. §291, and the retroactivity of the Supreme Court's decision in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (sic) (1967). An indication of the complexity of the case is shown by the fact that the Court spent five days in chambers with counsel working on jury instructions.

On November 3, 1972, the jury returned a verdict for plaintiffs Export Association and M-C International, Inc., but found against plaintiff Lepinay as to both defendants. The jury found that (1) Sunkist and Reliance had conspired in restraint of trade by refusing to sell oranges to the exporters for export,

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(2) that Sunkist and Reliance had conspired to monopolize the relevant market consisting of oranges grown in Arizona and California for export to Hong Kong, (3) that Sunkist had attempted to monopolize that market, and (4) that Sunkist had monopoly power and did in fact monopolize that market. Following the trial on damages, the jury, on November 17, 1972, returned an award for Export Association in the amount of $238,704 and for M-C International, Inc., in the amount of $2,363.

On January 26, 1973, plaintiffs moved for an award of attorneys' fees, pursuant to §4 of the Clayton Act, and for certain equitable relief, pursuant to §16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Specifically, plaintiffs requested attorneys' fees in the amount of $246,712.05 in the Export Association case and $31,-411.05 in the M-C International, Inc. case for a total of $278,123.10, while other counsel sought $10,000 for work done early in the case. On May 1, 1973, plaintiffs' attorneys asked for an additional $9,474 in attorneys' fees, $8,290 in the Export Association case and $1,184 in the M-C International, Inc., case, for legal services performed in connection with the application for equitable relief. Defendants contended that plaintiffs' attorneys' fees should run between 15 and 35 per cent of the single damages awarded, or between $36,150 and $84,350. In addition, plaintiff sought the dissolution of Sunkist Growers, Inc., claiming that to be the only possible manner of curing the effects of the illegal practices found by the jury. It is to the merits of these two requests that the Court now directs its attention.

Attorneys' Fees

In awarding attorneys' fees, the court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa. 1965) listed as some of the factors to be considered the following:

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge of the court has of the conferences, arguments that were presented, and of work shown by the record to have been done by attorneys for the plaintiff prior to trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff." 245 F.Supp. 302-303.

While these factors can assist the court in assessing the attorneys' fees to be awarded, no particular formula can be relied on since it is the particular combination of these factors in a case which makes each award *sui generis*. In sum, each case turns on its own facts.

The facts of this case reveal first the absence of any prior judgment or decree in a case brought by the Government.* Second, the court notes the presence

*A Government consent decree entered in *United States v. California Fruit Growers Exchange, et al.*, 1940-43 CCH Trade Cases, paragraph 56, 247 (S.D.Cal. 1942), involving Sunkist's predecessor, was discovered and supplied the Court after the trial was over. This decree was not a part of the record, not relied upon to establish liability, and given no weight in this Court's decision as to fees. Indeed, it is not clear that the decree reaches any of the conduct in question here.

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of very eminent counsel on both sides of this case with very substantial experience in antitrust litigation. Third, the Court must consider the time and labor spent by counsel on the case, as evidenced both by the affidavits and records submitted by counsel, and by the knowledge which the Court has of the conferences, arguments, and time spent on the case both prior to as well as during the trial. Without going into the details of the time sheets and statistics, it is clear that plaintiffs' attorneys did spend 3,700 hours on the case. While there was some question as to the allocation of hours made by plaintiffs, the Court notes that much of the time allocated to plaintiff Lepinay, who was found not to have been damaged by defendants, was in fact used to take evidence which was vital to the liability phase of the trial. Accordingly, such time should properly have been included in plaintiffs' billable hours, and more than compensates for any of the minor misallocations alleged. As set out in Mr. Archer's affidavit, the Court finds the hours to have been fairly allocated to the cases. Insofar as the Court has in effect reduced the number of billable hours claimed, it may be said to result from the normal practice of so doing where there is a change in counsel responsible for a case which occurred here. This is done because of the overlapping effort involved in each lead attorney's familiarizing himself with the case.

Fourth, the Court has already noted the magnitude and complexity of the litigation and the substantial efforts of counsel for both sides in disposing of those issues.

Fifth, the Court gives some consideration to the actual amounts recovered. Accordingly, counsel have

presented several cases urging that the Court use the percentages of damages awarded in those cases as attorneys' fees as guides in reaching an award in this case. The Court, however, is of the opinion that these cases are of little value. An analysis of the cases, as well as those found in "Attorneys' Fees in Individual and Class Action Antitrust Litigation," 60 Cal.L.Rev. 1656 (1972) reveals that many of those cases are over twenty years old. The substantial increase in hourly charges for legal services over that time period make the earlier decisions of dubious value. More importantly, the Court feels that each case must turn on its own facts and that any attempt to rely on such a statistical analysis or percentage formula creates but an illusion of precision and fairness.

Finally, the Court gives some weight to its view of what would have been reasonable for counsel to charge a victorious plaintiff. Noteworthy in this respect were Sunkist's own attorneys' fees, which counsel represented to be $234,488.85. In addition, the Court felt that some inquiry into plaintiffs' fee arrangement with counsel was advisable in view of the decision by the Court of Appeals for the First Circuit in *Farmington Dowel Products Co. v. Forster Mfg. Co.,* 436 F.2d 699 (1 Cir. 1970). Under the arrangements made, counsel is to receive 20 percent of the damages awarded to Export Association and 33 per cent of those awarded to M-C International, Inc., both in addition to the attorneys' fees awarded.

These six factors constituted the principal considerations in the Court's assessment of attorneys' fees in this case. Accordingly the Court feels that an award of $192,700 in the Export Association case and $2,300

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in the M-C International case is a reasonable attorneys' fee, while Mr. Simpson is due an additional $5,000 for his preliminary work in the cases, thereby making the total award $200,000.* The Court is well aware of the fact that that is approximately 83 per cent of the single damages awarded, but feels that, for the reasons explained this figure is to be attributed no special significance.

In view of the limited nature of the equitable relief granted, the Court has awarded no attorneys' fees for the legal services rendered in connection with that application.

Of the attorneys' fees awarded, approximately $22,-500 thereof represents the time charges attributable to the firm's legal assistants. While it is well established that the costs awarded a successful antitrust private plaintiff may not include fees assessed for the work done by accountants, *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964), the Court feels that the work done by legal assistants is substantially different and should properly

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*The Court finds that plaintiffs' counsel did in fact expend some 3700 hours of attorneys' time in the handling of the Export Association case. In awarding attorneys' fees in that case in the amount of $170,200, the other $22,500 being attributable to the work of legal assistants, the Court thereby allows an average hourly rate of $46 for the attorneys' time spent. While somewhat in excess of that allowed in the recent Ninth Circuit opinion in *Perkins v. Standard Oil Company of California,* 474 F.2d 549 (9th Cir. Feb. 12, 1973), the Court feels that this difference is justified in view of the greater portion of partners' time involved in this case. Specifically, the Court feels the $75 hourly rate requested by Mr. Archer and Mr. Sullivan to be reasonable, other partners being billed at $60 an hour, and the associates at between $35 and $50 an hour.

be considered a part of the award of attorneys' fees. In so holding, this Court is fully aware of the view expressed by Judge Metzner in *Trans World Airlines, Inc. v. Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970), where the court refused to award fees for persons who worked on the case but were not members of the Bar in the year that the services were rendered. However, the decision does not preclude an award for the services of legal assistants, and this Court does so for reasons of both policy and practice. As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers. Clients are generally notified of this practice, and the statement for legal services includes a charge for the work of these assistants. As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and is thus a practice to be encouraged. A contrary result might be seized by some as requiring attorneys to perform the services of collating documents and digesting and indexing testimony, for example. Such a result would be neither efficient nor in the public interest. Accordingly, this Court holds that the costs of legal assistants are properly to be included in determining reasonable attorneys' fees.*

*In this particular case, however, the Court feels that an award of $20 per hour for the 1500 assistant hours involved in this case is too high. Where the assistants are expected to contribute 35 billable hours per week, or approximately 1750 hours per year, and are earning between $750 and $1,000 per month, or $9,000-$12,000 per year, a twenty dollar an hour rate would probably return a profit to the firm, even after allocating appropriate overhead and related expenses to

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Equitable Relief

In its prayer for equitable relief, plaintiffs pray that the Court order the dissolution of Sunkist Growers, Inc., or, alternatively, that it order Sunkist to refrain from sales of oranges in Hong Kong. Plaintiffs also ask that Reliance be enjoined from selling oranges in Hong Kong for a period of time equal to that during which they enjoyed the fruits of their illegal exclusive agreement, approximately six years. For the reasons set out below, the Court holds that, even assuming arguendo that it has the power to award such relief to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.

As authority for the proposition that courts are empowered to award private litigants a decree dissolving the antitrust violator, plaintiffs refer the Court to two recent cases in this Circuit, *International Telephone and Telegraph Corporation v. General Telephone & Electronics Corp.*, 351 F.Supp. 1153 (D.Haw. 1972) and *Calnetics Corporation v. Volkswagen of America, Inc.*, 348 F.Supp. 606 (C.D.Cal. 1972). A reading of both of these cases reveals that it was not dissolution, but rather divestiture, which the courts ordered in those cases. Courts have in fact recognized the very substantial distinction between these remedies, the one involving the mere disengagement of the offending units, usually under the aegis of §7 of the Clayton Act, 15 U.S.C. §18, and the other the abolition of

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the legal assistant. The Court feels that the firm may not include an element of profit in its statement for such services, and therefore feels that $20 per hour is excessive. Accordingly, the appropriate rate in this instance is $15 per hour.

the entity altogether. In speaking even of divestiture, the courts have stressed the restraint with which the remedy must be used. See *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 603 (1951).

Furthermore, this Court is aware of no case in which a private litigant, as opposed to the Government, has been awarded such relief. We need not reach that question here in any event, since there has been no showing which would justify such relief in this case.

The gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges, thereby cutting off their only source of supply, by the exclusive agreement with Reliance, and it is that condition which the Court has sought to cure in fashioning its equitable decree.

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that:

1. The exclusive selling agreement entered into by Sunkist and Reliance be terminated and not be given any further effect by the parties;

2. Sunkist be enjoined from refusing to make available to qualified purchasers oranges from the domestic department, regardless of the ultimate purpose for which that purchaser seeks the oranges; and

3. Sunkist be enjoined from refusing to sell oranges from its export department to any qualified exporters. The price to such exporters shall not exceed the net price at which Sunkist markets its oranges directly in Hong Kong. The net price shall be determined by deducting from quoted price in Hong Kong the cost of insurance, ocean freight, tolls, handling, commis-

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sion to agents, and all other payments to third parties arising from the export of said oranges to Hong Kong.

However, nothing in this decree shall be construed as enjoining or restraining Sunkist from selling oranges directly to Hong Kong, either on its own or through non-exclusive sales agents.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that jurisdiction of this case is retained for the purpose of enabling any of the parties to apply to this Court at any time for such further relief as may be appropriate for the effectuation of this decree.

Dated: May 11, 1973.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

Order and Judgment.

United States District Court, Northern District of California.

Pacific Coast Agricultural Export Association, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-49691-CBR.

M-C International, Inc., Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-69-331-CBR.

Robert Louis Lepinay, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants. No. C-69-332-CBR.

The jury in these cases having returned its final verdicts on November 17, 1972, and the Court having rendered its decision on attorneys' fees and equitable relief on May 11, 1973, the following constitutes the judgment of this Court.

The jury having returned verdicts against Sunkist Growers, Inc., in favor of the following members of plaintiff association in the amounts shown:

John De Martini Co., Inc.	$10,677.00
Ghiselli Bros., Inc.	13,514.00
Honolulu Distributors, Inc.	2,781.00
Paramount Export Co.	99,941.00
Sunrise Produce Co.	16,936.00
Liberty Gold Fruit Co.	87,464.00
Pacific Produce Co.	7,391.00

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IT IS HEREBY ORDERED that these amounts be trebled as follows:

John De Martini Co., Inc.	$32,031.00
Ghiselli Bros., Inc.	40,542.00
Honolulu Distributors, Inc.	8,343.00
Paramount Export Co.	299,823.00
Sunrise Produce Co.	50,808.00
Liberty Gold Fruit Co.	262,392.00
Pacific Produce Co.	22,173.00

pursuant to section 4 of the Clayton Act, 15 U.S.C. §15, and that defendant Sunkist shall pay these sums to plaintiff association, with interest thereon from the date of judgment.

The jury having returned a verdict finding Sunkist Growers, Inc., and Reliance Commercial Enterprises, Inc., jointly and severally liable to M-C International, Inc., in the amount of $2,363.00, IT IS HEREBY ORDERED that that amount be trebled to $7,089.00, pursuant to section 4 of the Clayton Act, 15 U.S.C. §15, and that defendants Sunkist and Reliance shall pay that sum to M-C International, Inc., with interest thereon from the date of entry of judgment.

IT IS HEREBY FURTHER ORDERED that defendant Sunkist Growers, Inc., pay to plaintiffs the costs of suit, including attorneys' fees in the amount of $197,700 in the Pacific Coast Agricultural Export Association case, and the costs of suit, including attorneys fees in the amount of $2,300 in the M-C International, Inc., case.

In accordance with the Opinion and Order of this Court dated May 11, 1973, IT IS HEREBY FURTHER ORDERED that:

1. The exclusive selling agreement entered into by Sunkist and Reliance be terminated and not be given any further effect by the parties;

2. Sunkist be enjoined from refusing to make available to qualified purchasers oranges from the domestic department, regardless of the ultimate purpose for which that purchaser seeks the oranges; and

3. Sunkist be enjoined from refusing to sell oranges from its export department to any qualified exporters. The price to such exporters shall not exceed the net price at which Sunkist markets its oranges directly in Hong Kong. The net price shall be determined by deducting from quoted price in Hong Kong the cost of insurance, ocean freight, tolls, handling, commission to agents, and all other other payments to third parties arising from the export of said oranges to Hong Kong.

However, nothing in this decree shall be construed as enjoining or restraining Sunkist from selling oranges directly to Hong Kong, either on its own or through non-exclusive sales agents.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that jurisdiction of this case is retained for the purpose of enabling any of the parties to apply to this Court at any time for such further relief as may be appropriate for the effectuation of this decree.

Dated: May 11, 1973.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

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1. Since the Ninth Circuit adhered to well-established principles that a private party must prove injury and damages resulting from violations of antitrust law, no damage issue is presented for this Court's review except the sufficiency of the evidence and, as to that issue, no compelling reason exists for yet another appellate review of evidence already found sufficient by the court of appeals 5

2. The court of appeals properly affirmed the jury's finding that petitioner monopolized in violation of §2 of the Sherman Act and, in any event, the finding that petitioner attempted to monopolize and conspired to monopolize independently sustain the verdict that petitioner violated §2 of the Sherman Act 10

3. Under Warth v. Seldin, 422 U.S. 490 (1975), the Ninth Circuit's conclusion that an association whose members assigned their claims to it had standing to seek equitable relief was proper and, in any event, the injunction will remain in effect whether or not the association is a proper party thereto 13

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In the Supreme Court
OF THE
United States

October Term, 1975

No. 75-1325

Sunkist Growers, Inc.,
Petitioner,

vs.

Pacific Coast Agricultural Export Association
and M-C International, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

QUESTIONS PRESENTED

1. Is the evidence sufficient to sustain the jury's verdict as to injury and damages proximately caused by the antitrust violation?

2. Is the evidence sufficient to sustain the jury's findings that petitioner violated §2 of the Sherman Act by actually monopolizing, attempting to monopolize, and conspiring to monopolize?

(a) Is it within the jury's province to conclude that the petitioner had monopoly power to

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control prices or exclude competition where it had a distribution market share fluctuating between 45% and 70%, an admitted monopoly over the supply market, and faced small insignificant competitors?

3. Is a trade association whose members have assigned their claims to it a proper party to seek injunctive relief under §16 of the Clayton Act?

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is largely a reiteration of its earlier unsuccessful factual arguments made to the jury and subsequently to the Ninth Circuit (P. at 8-14).[1] While Sunkist's petition does not purport to challenge the sufficiency of the evidence, its statement of facts suggests that its position is predicated upon such a contention. The evidentiary issues raised are improperly presented in the petition because it does not refer to, much less explain, all the evidence admitted at trial on those issues. Petitioner simply ignores unfavorable evidence.[2]

---

[1]Throughout this brief, "P." refers to the Petition for Writ of Certiorari of Sunkist Growers, Inc., No. 75-1325; "Opinion, P.A." refers to the Opinion of the Court of Appeals for the Ninth Circuit which is an appendix to the above Petition; "R.T." refers to the Reporter's Transcript of the trial as transmitted to the Court of Appeals; "C.T." refers to the clerk's *transcript* of the record on appeal; "P.X.", "S.K.", and "R.X." refer to the trial exhibits of respondents, petitioner Sunkist, and defendant Reliance respectively.

[2]For example:

(a) Petitioner's proffered business reasons for agreeing with Reliance to exclude plaintiffs from the market and appointing Reliance its exclusive agent is at odds with the finding that peti-

The case is correctly stated in the opinion of the court of appeals:

> "Plaintiff-appellant Pacific Coast Agricultural Export Association (the Association) is a Webb-Pomeraine association[1] of fresh fruit exporters who among other things serve as middlemen in exporting oranges to Hong Kong and the Far East. Plaintiff-appellant M-C International, Inc. (M-C) also exports oranges to Hong Kong.
>
> "Defendant and cross-appellant Sunkist Growers, Inc. (Sunkist) is a federated agricultural cooperative comprised of several thousand Arizona and California citrus fruit growers who grow and pack citrus fruits for sale in the United States and abroad. Defendant and cross-appellant Reliance Commercial Enterprises, Inc. (Reliance) conducts business as a broker of citrus fruits in the Far East.
>
> "[1]The Webb-Pomeraine Act [15 U.S.C. §§61-65], allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy an exemption from antitrust liability for that export trade."

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tioner made an agreement with Reliance with a primary purpose of unreasonably excluding the exporters from the market (Opinion, P.A. at 9-10; Appendix attached hereto at i).

(b) Notwithstanding the disclaimers in its petition (P. at 10-11 and n.5), Sunkist used its control over district exchanges, not for legitimate cooperative purposes, but to prevent competition from exporters (C.T. 401, 404; P.X. 74, 78).

(c) The record belies petitioner's claim that as a result of its antitrust violations "a healthy competition between Sunkist and the exporters developed . . ." (P. at 11). After March, 1966, the exporters were prevented by Sunkist from purchasing the oranges they needed for sale in Hong Kong (R.T. 264-65, 845-47, 955, 994, 1055-56, 1092, 1147, 1234-35). The market shares of P.C.A.E.A.'s assignors and M-C in the Hong Kong orange business declined dramatically after the Sunkist-Reliance agreement of February 1966 (P.X. 146-153), and three of those exporters were forced out of the market altogether (P.X. 148, 149, 151).

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"As assignee of the rights of seven of its members, the Association charged Sunkist with violating Section 1 of the Sherman Act [15 U.S.C. §1], by conspiring with Reliance to restrain trade, and with violating Section 2 [15 U.S.C. §2], by conspiring and attempting to monopolize and monopolizing exports from Arizona and California to Hong Kong. In a separate action M-C similarly charged both Sunkist and Reliance. The actions were consolidated for trial by agreement. [footnote omitted]

"The jury returned a general verdict and answered 16 special interrogatories in favor of plaintiffs, finding that Sunkist and Reliance had engaged in each alleged anticompetitive practice. The jury fixed damages at $238,704 for the Association's assignors, and $2,363 for M-C. [footnote omitted]

"The district court thereafter awarded treble damages and attorneys' fees of $205,250. [footnote omitted] It ordered the termination of defendants' exclusive sales agreement, and enjoined Sunkist from refusing to sell oranges through its domestic and export departments to qualified buyers at competitive prices. The court refused to enjoin Sunkist *from selling to* Hong Kong importers, either directly or through nonexclusive agents, and also denied plaintiffs' request that Sunkist be dissolved" (Opinion, P.A. at 3-5).

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ARGUMENT

1. SINCE THE NINTH CIRCUIT ADHERED TO WELL-ESTABLISHED PRINCIPLES THAT A PRIVATE PARTY MUST PROVE INJURY AND DAMAGES RESULTING FROM VIOLATIONS OF ANTITRUST LAW, NO DAMAGE ISSUE IS PRESENTED FOR THIS COURT'S REVIEW EXCEPT THE SUFFICIENCY OF THE EVIDENCE AND, AS TO THAT ISSUE, NO COMPELLING REASON EXISTS FOR YET ANOTHER APPELLATE REVIEW OF EVIDENCE ALREADY FOUND SUFFICIENT BY THE COURT OF APPEALS.

Plaintiff asserts that the issues raised by the Ninth Circuit holding as to injury and damages are similar to those in a case in which this Court has recently granted certiorari, *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.* 523 F.2d 262 (3d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3471 (U.S. February 23, 1976) (No. 75-904) *sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* Petitioner's own characterization (P. at 15) of the *Brunswick* case indicates the erroneousness of that assertion. There the Third Circuit permitted a plaintiff to recover damages in the absence of any proof of injury.[3] This Court has granted certiorari on that issue (44 U.S.L.W. 3471).

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[3]In *Brunswick,* the plaintiff abandoned its Sherman Act § 1 claim and the jury rejected its Sherman Act §2 claim. *NBO Industries Treadway Cos., Inc. v. Brunswick Corp., supra,* 523 F.2d at 265. The only violation of the antitrust laws found was that of Clayton Act §7 and the Third Circuit concluded that damages were recoverable even if that violation was premised only upon the *potential* lessening of competition. *Id.* at 268, 271-73. In the present case, damages are not predicated on future possibilities but upon past violations and impact, the jury having found and the Ninth Circuit having affirmed that petitioner violated both Sherman Act §§ 1 and 2 to the injury of respondents.

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In contrast to the Third Circuit's novel approach, the Ninth Circuit in this case simply applied the well-established principle that a party must prove injury and damage to maintain his action under §4 of the Clayton Act:

> "Sunkist correctly notes that a private antitrust verdict cannot be sustained without proof of injury. (citation omitted) The district court so instructed the jury as to each charge, and the requirement was reiterated as to each charge in the written interrogatories.
>
> "Sunkist argues *inter alia* that the appellants' damages did not arise proximately from the alleged illegal activity . . . .
>
> "A. *Damage Causation.*
>
> "Sunkist's contention . . . is that plaintiffs lost no sales or profits from insufficient supply of export 'pool' oranges, since they would not have purchased them even if they were available. . . . [T]he jury could reasonably conclude . . . that either the refusal to sell export 'pool' oranges, or the restriction of plaintiffs' ability to purchase domestic 'brand' oranges, or a combination of both, proximately led to diminution of plaintiffs' market share. Such clearly constitutes 'reasonable probability [of] the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue.' (citations omitted)" (Opinion, P.A. at 15-16).

Yet, in the face of this textbook application of the basic antitrust law requirement for damage recovery, petitioner claims that the Ninth Circuit allowed the verdict to stand by "removing any require-

ment of proof of injury resulting from the alleged violation" (P. at 17). This characterization is inexplicable.[4]

Petitioner's attack on the method of proving damages is even more tenuous. It is simply a reiteration of the argument already rejected by the Ninth Circuit that respondents' damage projections were improper. Respondents measured damages by projection of their actual market shares prior to the violation to the actual market sales figures for the period in question. As the Ninth Circuit noted (Opinion, P.A. at 18), the propriety of that method of measuring damages was clearly established by the "before and after" test sanctioned by this Court in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 259-63 (1946). Further, in factual situations strikingly similar to the present case, courts have approved damages measured by projection of previously existing market shares to the actual market figures for the period. *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 903-04 (5th

[4]Petitioner's reference (P. at 16-17) to the court of appeals' discussion of the sufficiency of the evidence with respect to the jury's finding that defendants unlawfully agreed to unreasonably restrain trade under §1 of the Sherman Act is misplaced. It confuses the appellate court's discussion as to what makes defendants' conduct illegal under §1 with what satisfies the requirements of proving injury and damage. The court of appeals, however, carefully distinguished between the two by specifically stating at the outset of the portion of the opinion to which petitioner refers (Opinion, P.A. at 9 n.9) that issues as to proof of damage causation and amount were discussed elsewhere in the opinion. Petitioner's attempt to create an issue for this Court's review by taking statements out of context should be disregarded.

In any event, petitioner has not requested this Court's review of the sufficiency of the evidence as to the §1 violation itself and the Ninth Circuit's careful evaluation of such evidence (Opinion, P.A. at 9-10) eliminates any need for such an inquiry.

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Cir.), *cert. denied,* 412 U.S. 923 (1973); *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.,* 383 F.2d 97, 106 (5th Cir. 1967); *accord, Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 22-24 (5th Cir.), *cert. denied,* 419 U.S. 987 (1974) [damage proof may include estimates based on assumptions as to disputed facts].

As the Ninth Circuit's opinion noted (Opinion P.A. at 18-19), the use of the "before and after" method of measuring damages was properly utilized because there was a sufficient factual "showing that the market conditions in the two periods were similar but for the impact of the violation" (Opinion, P.A. at 18).

Nonetheless, petitioner attempts to resurrect the argument—rejected by the Ninth Circuit—that it was improper to allow respondents to establish damages during the violation period based upon their pre-existing shares because respondents' diminished market shares during the violation period might have resulted from legitimate competition by Sunkist.

Petitioner's reading of the Clayton Act to allow a defendant immunity from damages, due to the *possibility* that such defendant could have captured the same share of the market legally, is ridiculous. The Clayton Act protects a defendant against paying damages only if its violations of the antitrust laws did not result in any injury to plaintiff. "Defendants' illegal seizure of a market share to the plaintiffs' injury is not protected merely because the defendant might have achieved the same result by legal means" (Opinion, P.A. at 17). Acceptance of petitioner's

argument is tantamount to condoning the theft of a sum of money on the ground that the thief could have earned it legally.

Further, the evidence was conflicting as to whether petitioner would have entered the market but for its illegal activities and agreement with Reliance, and the jury obviously concluded that Sunkist would not have done so (Opinion, P.A. at 17).[5]

Finally, irrespective of the sufficiency of respondents' evidence as to damage measurement, petitioner's own evidence independently sustains the amounts of the damage verdicts (R.T. 6954-76, 7005-28, 7082-83). Petitioner introduced evidence upon which the jury could project lost sales by respondents during the relevant period in amounts sufficient to sustain the damage award (S.K. 2591-E, 2609-C, 4301, 4302, 4305, 4305-A, 4306, 4306-A). For example, Professor Davis' testimony relating to the elasticity of demand reduces respondents' sales projections by only approximately 10 percent (R.T. 4478-89); the resultant damages are far in excess of those awarded.

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[5]Petitioner offered evidence and cross-examined respondents on the supposition that Sunkist would have been in the market anyway, presumably legally (R.T. 6823-954; S.K. 2591-F). Even so, there is no evidence that Sunkist would have made direct sales in Hong Kong absent its illegal agreement with Reliance. For example, shortly before the illegal agreement with Reliance, Authenrieth (Sunkist's Export Sales Manager) expressed his opinion as to the advisability of continuing to deal through the exporters (P.X. 117). Petitioner is therefore wrong in asserting that this issue—as to whether or not Sunkist would have entered the market but for the illegal conspiracy—was not raised at trial (P. at 19).

2. THE COURT OF APPEALS PROPERLY AFFIRMED THE JURY'S FINDING THAT PETITIONER MONOPOLIZED IN VIOLATION OF §2 OF THE SHERMAN ACT AND, IN ANY EVENT, THE FINDINGS THAT PETITIONER ATTEMPTED TO MONOPOLIZE AND CONSPIRED TO MONOPOLIZE INDEPENDENTLY SUSTAIN THE VERDICT THAT PETITIONER VIOLATED §2 OF THE SHERMAN ACT.

Petitioner requests that the Court review the Ninth Circuit's affirmance of the jury's verdict that it monopolized in violation of §2 of the Sherman Act.

First, that request for review is inappropriate because the issue as to actual monopolization of the market, no matter how resolved, will have no effect upon the result in this case. In addition to finding that petitioner violated §2 by actual monopolization, the jury specifically found and the court of appeals specifically affirmed that petitioner attempted to monopolize *and* conspired to monopolize in violation of §2 of the Sherman Act (Appendix attached hereto at iii-v; Opinion, P.A. at 13-15). Petitioner raises no issue as to the propriety of the findings that it attempted and conspired to monopolize.[6] Accordingly, no useful purpose would be served by this Court's review of a question which could have no possible effect upon the result in the case. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 182-24 (1959).

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[6]Nor is any issue as to the market share required for actual monopolization relevant to such findings. For example, it has been held that proof of relevant market and/or market power is not essential in a conspiracy to monopolize charge. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961).

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In any event, the Ninth Circuit properly held that it was within the jury's province to find that Sunkist monopolized the market for oranges grown in Arizona and California for export to Hong Kong. Petitioner claims that "the opinion below significantly expands the test of monopoly power set forth in *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966) by sustaining a finding of monopoly power based solely on a market share of 45-62%" (P. at 20).[7] In fact, the court of appeals affirmed the jury's finding that Sunkist had monopolized the market for oranges grown in Arizona and California for export to Hong Kong on the basis of the criteria set forth by this Court in *Grinnell*.

In doing so, the court correctly noted that while a market share which fluctuated between 45% and 70% is not itself conclusive of the existence of monopoly power, such market share was sufficient when taken into account with other factors to support a finding of power to exclude competition or control prices (Opinion, P.A. 11-12).

Specifically, the court of appeals noted that Sunkist acknowledged its control over the supply market (Opinion, P.A. at 13). As noted by the court of appeals and petitioner, Sunkist's members control approximately 75% of the oranges grown in California and Arizona (P. at 8, 20; Opinion, P.A. at 5). Contrary to the petitioner's assertion (P. at 21-22), the

[7]In this regard, the petition misstates the opinion of the Ninth Circuit, which spoke of petitioner's control of the relevant market as ranging between 45% and 70%, not 62% (Opinion, P.A. at 12).

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Ninth Circuit expressly articulated the significance of that fact in terms of petitioner's power to control prices or exclude competition:

> "Rather, plaintiffs attempted to show, and did show, that Sunkist's control of supply was employed to extend its monopoly illegally into distribution" (Opinion, P.A. at 11).

See *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377 (1973); *Poster Exch., Inc. v. National Screen Serv. Corp.,* 431 F.2d 334, 339-40 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971).

That conclusion is supported by evidence, including the testimony of petitioner's own Export Sales Manager, that Sunkist's control over the supply market is intrinsically intertwined with its control over the oranges exported to Hong Kong. *E.g.,*

> "Q. Now prior to March, 1966, what market share of California-Arizona oranges sold in Hong Kong had been controlled by Sunkist?
>
> A. Well, a very substantial share. I'm afraid I can't give you a number.
>
> Q. 75 to 85 percent?
>
> A. Are we talking about what reached the Hong Kong market or on this side?
>
> Q. The supply on this side.
>
> A. Oh, it was the same.
>
> Q. 85 percent?
>
> A. Yes." (R.T. 2564-68)

Petitioner used its control over the supply market to exclude competitors. For example, Sunkist demanded 85 percent of the shipping companies' refrigeration space by pointing out that it controlled 85 percent of the supply of California-Arizona oranges (R.T. 2547-56, 2564-69; P.X. 36, 56).

The court of appeals also correctly evaluated petitioner's power to control prices or exclude competition in light of the diminishing number of competitors which were small in size (Opinion, P.A. at 11-12). The market shares of P.C.A.E.A.'s assignors and M-C in the Hong Kong orange business declined dramatically after the Sunkist-Reliance agreement of February 1966 (P.X. 146-153), and three of those exporters were forced out of the market altogether (P.X. 148, 149, 151).

The significance of Sunkist's size in comparison with that of the small exporters and Sunkist's ability to exclude the exporters as competitors at will was acknowledged by Sunkist in a letter written to its co-defendant Reliance: "I must confess that we have proceeded softly on this controversial issue because we decided it was more important for us not to create the image of Sunkist as a giant power wiping out many small exporters with one blow" (P.X. 56).

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3. UNDER WARTH v. SELDIN, 422 U.S. 490 (1975), THE NINTH CIRCUIT'S CONCLUSION THAT AN ASSOCIATION WHOSE MEMBERS ASSIGNED THEIR CLAIMS TO IT HAD STANDING TO SEEK EQUITABLE RELIEF WAS PROPER AND, IN ANY EVENT, THE INJUNCTION WILL REMAIN IN EFFECT WHETHER OR NOT THE ASSOCIATION IS A PROPER PARTY THERETO.

Sunkist seeks review by this Court on the basis of a misstatement as to the holding of the court of appeals. Contrary to Sunkist's petition, the Ninth Circuit did not reach a general conclusion that an "Association can seek injunctive relief on behalf of its members even though it was not itself threatened by antitrust violations" (P. at 23).

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Instead the court of appeals' conclusion was highly specific: where an association receives an assignment of members' claims, "the assignee association may seek whatever equitable relief may be available to each assignor" (Opinion, P.A. at 22).[8] General principles as to the assignability of claims are applicable to antitrust cases. Opinion, P.A. at 20; *South Carolina Council of Milk Producers, Inc. v. Newton,* 241 F. Supp. 259, 265 (E.D.S.C. 1965), *rev'd on other grounds,* 360 F.2d 414 (4th Cir.), *cert. denied,* 389 U.S. 934 (1966); *Northern California Monument Dealers Association v. Interment Association of California,* 120 F. Supp. 93, 94-95 (S.D. Cal. 1954). Since the members' assignment was valid and intended to convey their claims, which included rights to equitable relief, the association was a real party in interest under Rule 17(a), Fed. R. Civ. P. (Opinion, P.A. 20-22).

For that reason, the Ninth Circuit decision in the present case in no way conflicts with *Nassau Cty. Ass'n of Ins. Agts., Inc. v. Aetna Life & Cas. Co.,* 497 F.2d 1151, 1153-54 and n.4 (2d Cir. 1974), *cert. denied,* 419 U.S. 968 (1974) (associations had no standing to bring treble damage action where there was no injury suffered as a result of defendants' practices, no showing that associations were in the target area of defendants' actions, associations did not do business or compete with defendants; no claim

[8]The court of appeals also stated that petitioner's failure to timely object that the Association was not a proper party to seek injunctive relief cast doubt on the argument that injunctive relief was barred (Opinion, P.A. at 20 n.16). This issue was never raised until 4½ years after the filing of the complaint (*id.*), and approximately four months after the jury verdict.

of an assignment of members' rights was asserted)[9], or with *Farmers' Co-op Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 103 (8th Cir. 1942) (a cooperative corporation cannot maintain an action for treble damages to its members).

Moreover, even without assignment of members' claims, this Court recently has indicated that an association is a proper party to pursue injunctive relief as representative of its members when such prospective relief will redound to the benefit of the members. In *Warth v. Seldin*, 422 U.S. 490 at 511, 515 (1975), the Court said:

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members. *E.g., National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. [*Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972)]. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members entitled to invoke the court's jurisdiction.
>
> * * *

[9]Moreover it is doubtful that the footnote of the decision upon which petitioner relies (see P. at 23, citing to 497 F.2d at 1154 n.4) retains any vitality in light of this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975).

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> "As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. *E.g., Sierra Club v. Morton,* 405 U.S. 727 (1972). But, apart from this, whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *E.g., National Motor Freight Assn.* [*v. United States*], 372 U.S. 246 (1963). See *Data Processing Service v. Camp,* 397 U.S. 150 (1970). Cf. Fed. Rule Civ. Proc. 23(b)(2)."

Here Sunkist concedes and the court of appeals found that members themselves had standing and the injunctive relief will inure to the benefit of the members (P. at 24 and n.16; Opinion, P.A. at 21). Accordingly, Sunkist's argument that the Association was an improper party to obtain injunctive relief is erroneous whether tested by the general rules as to the rights of an assignee or by this Court's articulation of an association's right to obtain injunctive relief which will redound to the benefit of its membership.

Further, the district court granted the subject injunctive relief to M-C in its lawsuit as well as to the

Association (Opinion, P.A. at 4-6, 36-37). M-C's standing, as an individual exporter, to obtain the subject equitable relief was not challenged. Accordingly, the injunction remains in effect whether or not the Association is a proper party thereto.[10]

As the court of appeals' opinion indicated, Sunkist contended that without the Association "the *de minimis* damage suffered by M-C ($2,363) does not in equity justify the extensive injunction relief granted" (Opinion, P.A. at 20). In effect, Sunkist argued that a party awarded $2,363 as actual damages suffered by reason of defendants' antitrust violations is not entitled to an injunction to prohibit future violations. Because of its conclusion that the injunctive relief was properly granted to the Association, the court of appeals did not find it necessary to dispose of this contention.

However, the language of §16 of the Clayton Act (15 U.S.C. §26) is dispositive of Sunkist's claim that there is a necessary relationship between the dollar value of past damages and the availability of future injunctive relief:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having

[10] "While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *State of Hawaii v. Standard Oil of California*, 405 U.S. 251, 262 (1972).

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> jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by the courts of equity . . . ."

Damages are for past conduct; an injunction goes to future conduct. A plaintiff can receive a million dollars for past conduct but still not be entitled to injunctive relief if there is no threat of continued illegal activity. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 868 (N.D. Cal. 1975); *see generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129-33 (1969). Conversely, an injunction may be proper where no damages have been awarded; *i.e.*, where plaintiff complains of no past conduct but simply points to a dangerous probability of future injury as a result of anticipated future conduct of the defendant. *See, e.g., Bedford Cut Stone Co. v. Journeyman Stone Cutters' Assn.*, 274 U.S. 37, 55 (1927); *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F.Supp. 888, 898-99 (S.D.N.Y. 1948).

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, San Francisco, California,
April 21, 1976.

Respectfully submitted,

RICHARD J. ARCHER,
KRISTINA M. HANSON,
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(Appendix Follows)

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Appendix

REPRINTED FROM REPORTER'S TRANSCRIPT 5961-5967.

CLERK'S READING OF JURY'S ANSWERS TO INTERROGATORIES

"INTERROGATORY No. 1:

"Was there a conspiracy between Sunkist and Reliance that Sunkist would refuse to sell oranges to exporters for export?"

Answer: "Yes."

"INTERROGATORY No. 2:

"If your answer to INTERROGATORY No. 1 is 'Yes,' was the act of Sunkist and Reliance an unreasonable restraint of trade pursuant to such conspiracy?"

Answer: "Yes."

"INTERROGATORY No. 3:

"If your answers to INTERROGATORIES 1 and 2 are 'Yes,' was such conspiracy between Sunkist and Reliance the proximate cause of damage to the business or property of any of the following:

"John DeMartini Co., Inc.?"	Answer: "Yes."
"Ghiselli Bros., Inc.?"	Answer: "Yes."
"Honolulu Distributors, Inc.?"	Answer: "Yes."
"Paramount Export Co.?"	Answer: "Yes."
"Sunrise Produce Co.?"	Answer: "Yes."
"Liberty Gold Fruit Co.?"	Answer: "Yes."
"Edward M. Bloch and Walter Loder d/b/a Pacific Produce Company?"	Answer: "Yes."
"Atlantic and Pacific Factors Robert L. Lepinay?"	Answer: "No."
"M-C International, Inc.?"	Answer: "Yes."

"INTERROGATORY No. 4:

"Is a relevant market applicable to the claim of monopolization what plaintiffs claim it to be: Oranges grown in Arizona and California for export to Hong Kong?"

Answer: "Yes."

"INTERROGATORY No. 5:

"If your answer to INTERROGATORY No. 4 is 'Yes,' did Sunkist possess monopoly power in that market?"

Answer: "Yes."

"INTERROGATORY No. 6:

"If your answer to Interrogatories No. 4 and No. 5 are 'Yes,' did Sunkist monopolize that market?"

Answer: "Yes."

"INTERROGATORY No. 7:

"If your answers to INTERROGATORIES 4, 5 and 6 are 'Yes,' did such a monopolization directly and proximately cause damage to the business or property of any of the following:

"John DeMartini Co., Inc.?"	Answer: "Yes."
"Ghiselli Bros., Inc.?"	Answer: "Yes."
"Honolulu Distributors, Inc.?"	Answer: "Yes."
"Paramount Export Co.?"	Answer: "Yes."
"Sunrise Produce Co.?"	Answer: "Yes."
"Liberty Gold Fruit Co.?"	Answer: "Yes."
"Edward M. Bloch and Walter Loder d/b/a Pacific Produce Co.?"	Answer: "Yes."
"Atlantic & Pacific Factors-Robert L. Lepinay?"	Answer: "No."
"M-C International, Inc.?"	Answer: "Yes."

"INTERROGATORY No. 8:

"Is there a relevant market applicable to the claim of attempted monopolization?"

Answer: "Yes."

"INTERROGATORY No. 9:

"If your answer to INTERROGATORY No. 8 is 'Yes,' did Sunkist have a specific intent to monopolize such relevant market?"

Answer: "Yes."

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"INTERROGATORY No. 10:

"If your answers to INTERROGATORIES 8 and 9 are 'Yes,' did Sunkist do one or more of the acts specified by plaintiffs in their attempt to monopolize claim, and if so, was any such act done wrongfully and in furtherance of that intent?"

Answer: "Yes."

"INTERROGATORY No. 11:

"If your answers to INTERROGATORIES 8, 9 and 10 are 'Yes,' did both elements—the intent and the act—together result in a reasonable probability that monopolization would sooner or later occur?"

Answer: "Yes."

"INTERROGATORY No. 12:

"If your answers to INTERROGATORIES 8, 9, 10 and 11 are 'Yes,' was such attempted monopolization the proximate cause of damage to the business or property of any of the following:

"John DeMartini Co., Inc.?"	Answer: "Yes."
"Ghiselli Bros., Inc.?"	Answer: "Yes."
"Honolulu Distributors, Inc.?"	Answer: "Yes."
"Paramount Export Co.?"	Answer: "Yes."
"Sunrise Produce Co.?"	Answer: "Yes."
"Libert[y] Gold Fruit Co.?"	Answer: "Yes."
"Edward M. Bloch and Walter Loder d/b/a Pacific Produce Co.?"	Answer: "Yes."
"Atlantic and Pacific Factors-Robert L. Lepinay?"	Answer: "No."
"M-C International, Inc.?"	Answer: "Yes."

"INTERROGATORY No. 13:

"Was there a conspiracy between Sunkist and Reliance to monopolize an appreciable amount of commerce in the export of oranges grown in Arizona and California to Hong Kong?"

Answer: "Yes."

"INTERROGATORY No. 14:

"If your answer to INTERROGATORY 13 is 'Yes,' did Sunkist and Reliance enter into such conspiracy with a specific intent to monopolize that commerce?"

Answer: "Yes."

"INTERROGATORY No. 15:

"If your answers to INTERROGATORIES 13 and 14 are 'Yes,' were one or more of the acts specified by plaintiff Association in its Section 2 claims done, and if so, were they done in furtherance of such conspiracy to monopolize?"

Answer: "Yes."

"INTERROGATORY No. 16:

"If your answers to INTERROGATORIES 13, 14 and 15 are 'Yes,' was such conspiracy the proximate cause of damage to the business or property of any of the follow[ing]:

"John DeMartini Co., Inc.?"	Answer: "Yes."
"Ghiselli Bros., Inc.?"	Answer: "Yes."
"Honolulu Distributors, Inc.?"	Answer: "Yes."
"Paramount Export Co.?"	Answer: "Yes."
"Sunrise Produce Co.?"	Answer: "Yes."

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"Liberty Gold Fruit Co.?" Answer: "Yes."
"Edward M. Bloch and Walter Loder
d/b/a Pacific Produce Co.?" Answer: "Yes."
"Atlantic and Pacific Factors-
Robert L. Lepinay?" Answer: "No."
"M-C International, Inc.?" Answer: "Yes."

"INTERROGATORY No. 17:
"Did any of the following at some time from February to October, 1966, enter into a conspiracy to prevent Sunkist from selling oranges to Hong Kong importers?
"Pacific Coast Agricultural
Exporters Association?" Answer: "No."
"John DeMartini Co., Inc.?" Answer: "No."
"Ghiselli Bros., Inc.?" Answer: "No."
"Honolulu Distributors, Inc.?" Answer: "No."
"Paramount Export Co.?" Answer: "No."
"Sunrise Produce Co.?" Answer: "No."
"Liberty Gold Fruit Co.?" Answer: "No."
"Edward M. Bloch and Walter Loder,
d/b/a Pacific Produce Co.?" Answer: "No."
"Atlantic and Pacific Factors-
Robert L. Lepinay?" Answer: "No."
"M-C International, Inc.?" Answer: "No."

(THE CLERK:) That completes the interrogatories, Your Honor.

So say you all?

(Affirmative responses from the jury.)

The verdicts have been read and the interrogatories read.

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